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REPORTS

OF

DECISIONS

IN

THE SUPREME COURT

OF

THE UNITED STATES.

WITH NOTES, AND A DIGEST.

By B. R. CURTIS,
ONE OF THE ASSOCIATE JUSTICES OF THE COURT.

VOL. VII.

BOSTON:
LITTLE, BROWN AND COMPANY.
1864.

Entered according to Act of Congress, in the year 1855, by
B. R. Curtis,
in the Clerk's Office of the District Court of the District of Massachusetts.

RIVERSIDE, CAMBRIDGE:
STEREOTYPED AND PRINTED BY
H. O. HOUGHTON AND COMPANY.

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DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1827.

JUDGES DURING THE TIME OF THESE REPORTS.

HON. JOHN MARSHALL, CHIEF JUSTICE.
HON. BUSHROD WASHINGTON,
HON. WILLIAM JOHNSON,
HON. GABRIEL DUVALL,
HON. JOSEPH STORY,
HON. SMITH THOMPSON, AND
HON. ROBERT TRIMBLE,
} ASSOCIATE JUSTICES.
WILLIAM WIRT, ESQ., ATTORNEY-GENERAL.

Memorandum.—Mr. Justice TRIMBLE was appointed May 9, 1826.

THE PALMYRA. Escurra, Master.

12 W. 1.

This court possesses the power to reinstate any cause dismissed by mistake.

A stipulation for property subject to admiralty process, is a mere substitute for the thing itself, and the rights of the stipulators are subject to the same powers as might be exercised by the court over the property, if still in its custody.

They cannot prevent the reinstatement of a cause, though the court may not wholly disregard their interests.

Proceedings for condemnation upon captures made by public armed ships are in the name and authority of the United States, who prosecute as well for themselves as for the captors, and where damages are awarded against the latter, each have a right of appeal from that decree.

If a libel is not a sufficient basis for a decree, and the proofs show cause for condemnation, the case is remanded to the circuit court with directions to allow an amendment.

In general, a libel *in rem* for a forfeiture, which alleges the offence in the words of the statute, is sufficient.

In a libel *in rem* under the acts of March 3, 1819, and May 15, 1820, (3 Stats. at Large, 510, 600,) for piratical aggressions, it is not necessary to allege or prove a conviction of the person for the criminal offence.

Though probable cause is not a bar to damages for a mere municipal seizure, unless made so by statute, yet a seizure for piratical aggression is an exercise of a *quasi* belligerent right, and probable cause is a defence, as in prize causes.

THE case is stated in the opinion of the court.

The *Attorney-General*, and *Hayne*, for the appellants.

Tazewell, for the respondents.

STORY, J., delivered the opinion of the court.

This is the case of a proceeding *in rem*, by a libel of information founded on the act of congress of the 3d of March, 1819, c. 77, as continued in force by the act of congress of the 15th of May, 1820, c. 113. The 2d section of the former act authorizes the President "to instruct the commanders of public armed vessels of the United States, to seize, subdue, and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel." The 4th section declares: "That whenever any vessel or boat from which any piratical aggression, search, restraint, depredation, or seizure, shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought, and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion."

[*8]

The brig Palmyra is an armed vessel, asserting herself to be a privateer, and acting under a commission of the King of Spain, issued by his authorized officer at the Island of Porto Rico. She was captured on the high seas on the 15th of August, A. D. 1822, by the United States vessel of war Grampus, commanded by Lieutenant Gregory, after a short resistance, and receiving a fire from The Grampus, by which one man was killed, and six men were wounded. She was sent into Charleston, South Carolina, for adjudication. A libel was duly filed, and a claim interposed; and upon the proceedings in the district court of that district, a decree was pronounced by the court, that the

brig be acquitted, without any damages for the capture, injury, or detention. From this decree an appeal was made, by both parties, to the circuit court; and upon the hearing in that court, where, for the first time, the officers of the privateer were examined as witnesses, the circuit court pronounced a decree, *affirming so much [*9] of the decree of the district court, as acquitted the brig, and reversing so much of it as denied damages, and proceeded finally to award damages to the claimants, to the amount of $10,288.58. From this decree there was an appeal, interposed on behalf of the United States and the captors, to the supreme court. The cause came on to be heard upon this appeal, at February term, 1825, and upon inspection of the record, it did not then appear that there had been any final decree, ascertaining the amount of damages. The court were of opinion that if there had been no such decree, the case was not properly before the court upon the appeal, there not being any final decree, within the meaning of the act of congress. The court considered that the damages were but an incident to the principal decree; that the cause was but a single one; and that the cause could not, at the same time, be in the circuit court for the purpose of assessing damages, and in this court upon appeal, for the purpose of an acquittal or condemnation of the vessel. The questions indeed were different; but the cause was the same. Upon this ground the appeal was dismissed. But at the last term of the court, it appearing that in point of fact there had been a final award of damages, and that the error was a mere misprision of the clerk of the circuit court in transmitting an imperfect record, the court, upon motion of the appellants, at the last term, ordered the cause to be reinstated.

It is now contended that this court had no authority to reinstate the cause after such a dismissal. 1. Because it may operate to the prejudice of the stipulators or sureties, to whom the privateer was delivered, upon stipulation, in the court below; and, 2. Because the cause was capable of being heard in this court upon the appeal in respect to the decree of acquittal, that being the only decree in which the United States had any interest as a party; and that, as to the damages, the captors were the only persons responsible for damages, and they alone had a right of appeal respecting the same; so that by operation of law, the cause had *become divided [*10] into two separate and distinct causes, in which each party was an actor.

This court cannot concur in either objection. Whenever a stipulation is taken in an admiralty suit, for the property subjected to legal process and condemnation, the stipulation is deemed a mere

substitute for the thing itself, and the stipulators liable to the exercise of all those authorities on the part of the court, which it could properly exercise, if the thing itself were still in its custody. This is the known course of the admiralty. It is quite a different question, whether the court will, in particular cases, exercise its authority, where sureties on the stipulation may be affected injuriously. That is a subject addressed to its sound discretion. In the present case there was no ground for surprise or injury, to the stipulators, or indeed to any party in interest. If there had been no final award of damages, the cause would not have been properly before this court, and the appeal itself, being a nullity, would have left the cause still in the circuit court. But as such an award was made, the appeal was rightfully made; and the dismissal, being solely for a defect of jurisdiction apparent on the record, and founded on a mistake, constituted no bar to a new appeal, even if a general dismissal might. The appeal then might, at any time within five years, have been lawfully made, and have bound the parties to the stipulation, to all its consequences. The difference between a new appeal, and a reinstatement of the old appeal, after a dismissal from a misprision of the clerk, is not admitted by this court justly to involve any difference of right as to the stipulators. Every court must be presumed to exercise those powers belonging to it, which are necessary for the promotion of public justice; and we do not doubt that this court possesses the power to reinstate any cause dismissed by mistake. The reinstatement of the cause was founded, in the opinion of this court, upon the plain principles of justice, and is according to the known practice of other judicial tribunals in like cases.

The other objection has not, in our opinion, a more solid
[*11] *foundation. The libel was filed by the district attorney, as well in behalf of the United States, as of the captors, and prayed, as usual, a condemnation of the vessel, and distribution of the proceeds. This fact is noticed for the purpose of answering the observation made at the bar, as to the parties to the libel. It has been supposed that the United States, and the captors, are to be deemed severally libellants, having distinct rights, both of prosecution and appeal. But this proceeds upon a mistake. In every case of a proceeding for condemnation, upon captures made by the public ships of war of the United States, whether the same be cases of prize, strictly *jure belli*, or upon public acts in the nature of captures *jure belli*, the proceedings are in the name and authority of the United States, who prosecute for themselves as well as for the captors. The captors cannot, without the authority of the government, proceed to enforce condemnation. The suit is, in form and substance,

a proceeding by and in the name of the United States, for the benefit of all concerned. And whether the question respect the point of condemnation, or of damages, the United States have a right of appeal coextensive with the whole matter in litigation, and may interpose their protection to guard their agents and officers against injury and damages. These agents and officers are, indeed, in a certain sense, parties to the suit, as the seizing officer is in cases of mere municipal seizures; and when the claimant makes himself, by a demand of damages, an actor in the suit, no doubt exists that the court may proceed to decree damages against them, and thus entitle them to a separate right of appeal, if the government should feel that it had no further interest to pursue the suit. But still the right to damages must always be dependent upon the question of condemnation or acquittal, for it can never be successfully contended, that if a condemnation is finally adjudged, a decree for damages can be maintained. And, on the other hand, in a case of acquittal, the whole circumstances of the case must be taken into consideration, in order to ascertain that the case is one which justifies an award of damages. *In the present [*12] case, there was an appeal entered by the district attorney for the United States, and also for the captors, from the decree of the circuit court. If this decree was final, such an appeal brought up the whole cause as to all the parties; and would, in point of law, have produced the same effect, if in form the appeal had only been in the name of the United States. If the decree was not final, (as upon the original record it appeared to this court not to be,) then it was void as to all parties. Either way, then, there never was any separation of the parties libellants, so as to give rise to the point of separate independent causes. We are, then, of opinion that the whole cause is now rightfully before us.

It is contended, on behalf of the appellees, that the present suit cannot be maintained, because the libel itself is fatally defective in its averments. It is said to be too loose, inartificial, and general in its structure, to give a just foundation for any judgment of condemnation. If this were admitted to be true, the only effect would be, supposing the merits on the evidence appeared to be in favor of the libellants, that the court would according to its known course of practice remand the cause to the circuit court, with directions to allow an amendment of the libel, and ulterior proceedings consequent thereon. But there is asserted to be another fatal defect in the averments of the libel which is incapable of being cured, because it cannot be established in point of fact; and that is, that the offenders are not alleged to have been convicted upon any prosecu-

tion *in personam*, of the offence charged in the libel. The argument is, that there must be a due conviction upon a prosecution and indictment for the offence *in personam*, averred and proved, in order to maintain the libel *in rem*.

In respect to the first objection, it must be admitted that the libel is drawn in an inartificial, inaccurate, and loose manner. The strict rules of the common law as to criminal prosecutions, have never been supposed by this court to be required in informations of seizure in the admiralty for forfeitures, which are deemed to be [* 13] civil proceedings *in *rem*. Even on indictments at the common law, it is often sufficient to state the offence in the very terms of the prohibitory statute; and the cases cited by the attorney-general are directly in point. In informations in the exchequer, for seizures, general allegations bringing the case within the words of the statute, have been often held sufficient. And in this court it has been repeatedly held that in libels *in rem*, less certainty than what belongs to proceedings at the common law, will sustain a decree of condemnation, if the words of the statute are pursued, and the allegations point out the facts, so as to give reasonable notice to the party to enable him to shape his defence. There is, indeed, in admiralty proceedings, little ground to insist upon much strictness of averment, because, in however general terms the offence may be articulated, it is always in the power of the court to prevent surprise, by compelling more particular charges as to the matters intended to be brought forward by the proofs. In general, it may be said that it is sufficient in libels *in rem*, for forfeitures, to allege the offence in the terms of the statute creating the forfeitures. There may be exceptions to this rule, where the terms of the statute are so general as naturally to call for more distinct specifications. Without pretending to enumerate such exceptions, let us look at the allegations in the amended libel in the present case. It charges, "that the said brig called The Palmyra, &c., was, and is, a vessel from which a piratical aggression, search, depredation, restraint, and seizure, has been first attempted and made, to wit, upon the high seas, in and upon the schooner Coquette, a vessel of the United States, and of the citizens thereof, and in and upon the master, officers, and crew of the said schooner Coquette, citizens of the United States; and also in and upon The Jeune Eugenie, a vessel of the United States, and of the citizens thereof, and in and upon Edward L. Coffin, the master, and the officers and crew of the said vessel, being citizens of the United States, and also in and upon other vessels of the United States, their officers and crews, citizens of the United States, and in and upon other vessels of various nations, states, and kingdoms,

*their officers and crews, citizens and subjects of said [*14] states and kingdoms." Now, whatever may be said as to the looseness and generality, and consequent insufficiency of the latter clauses of this allegation, the former specifying The Coquette and Jeune Eugenie, (upon which alone the proofs mainly rely for condemnation,) have, in our opinion, reasonable and sufficient certainty. It was not necessary to state in detail the particular acts constituting the piratical aggression, search, depredation, restraint, or seizure. The general words of the statute are sufficiently descriptive of the nature of the offence; and the particular acts are matters proper in the proofs. We may, then, dismiss this part of the objection.

The other point of objection is of a far more important and difficult nature. It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part, or at least a consequence, of the judgment of conviction. It is plain, from this statement, that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law the offender's right was not devested until the conviction. But this doctrine never was applied to seizures and forfeitures created by statute, *in rem*, cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist, where there is both a forfeiture *in rem* and a personal penalty. *But in neither class of cases has it ever [*15] been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*. This doctrine is deduced from a fair interpretation of the legislative intention apparent upon its enactments. Both in England and America, the jurisdiction over proceedings *in rem*, is usually vested in different courts from those exercising criminal jurisdiction. If the argument

at the bar were well founded, there could never be a judgment of condemnation pronounced against any vessel coming within the prohibitions of the acts on which the present libel is founded; for there is no act of congress which provides for the personal punishment of offenders, who commit "any piratical aggression, search, restraint, depredation, or seizure," within the meaning of those acts. Such a construction of the enactments, which goes wholly to defeat their operation, and violates their plain import, is utterly inadmissible. In the judgment of this court no personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature.

Having disposed of these questions, which are preliminary in their nature, we may now advance to the consideration of those which turn upon the merits of the cause. These questions are: 1. Whether the present be, upon the facts, a case for condemnation; and, if not, 2. Whether it be a case for remunerative damages, for vindictive damages are and must be disclaimed.

Upon the first point, it is unnecessary to go into any examination at large of the various facts preceding and accompanying the capture, because the judges are divided in opinion; and, consequently, according to the known practice of the court, the decree of the circuit court, so far as it pronounced a decree of acquittal, must be affirmed.

In respect to the second point, we are all of opinion that the case is clearly not a case for damages. The whole circumstances [*16] present such well founded grounds for suspicion *of the piratical character and conduct of the privateer, as required Lieutenant Gregory, in the just exercise of his instructions from the President, under the acts of congress, to subdue and send her in for adjudication. That her crew were guilty of plunder from The Coquette and The Jeune Eugenie, is established by proofs entirely competent and satisfactory. Her exercise of the right of search on these vessels was irregular and unjustifiable, and indicated, on the part of the boarding officers, no disinclination to petty thefts, if they avoided forcible robbery. Her commission is itself liable to much suspicion and criticism. It varies essentially in the description of the rig, the size, and the denomination of the vessel from that on board of which it is found. It purports to be for a schooner of 93 tons, under the command of Don Pablo Llanger; it is found on board of a brig of 160 tons, commanded by Captain Escurra. It was originally granted for a three months' cruise, which had expired; and it purports to be renewed by the port captain of Porto Rico, a subordinate agent of the King of Spain, for a new cruise, by an indorsement on it, without any known authority. We do not

advert to these circumstances to establish the position that the commission was utterly void, or rendered the exercise of belligerent rights piratical. Whatever may be the irregularities in the granting of such commissions, or the validity of them, so far as respects the King of Spain, to found an interest of prize in the captors, if The Palmyra *bonâ fide* received it, and her crew acted *bonâ fide* under it, it ought, at all events, in the courts of neutral nations, to be held a complete protection against the imputation of general piracy. But the defects of the commission, connected with the almost total want of order and command on board of the privateer, and the manifest insubordination, and predatory spirit of the crew, could not but inflame, to a high degree, every other just suspicion. In short, taking the circumstances together, the court think that they presented, *primâ facie*, a case of piratical aggression, search, restraint, and depredation, within the acts of congress, open to explanation indeed, but if unexplained, *pressing heavily on the vessel for the [*17] purpose of forfeiture. Lieutenant Gregory, then, was justifiable in sending her in for adjudication, and has been guilty of no wrong calling for compensation.

It has been argued at the bar, that probable cause of seizure in this case constitutes no ground of defence against the claim of damages. It has been truly stated as the settled doctrine of this court, that in cases of seizures under mere municipal laws, probable cause, unless so made by statute, constitutes no ground for denying damages, or justifying the seizure. But it is supposed that probable cause is not an excuse or justification of any seizure or capture, except in cases *jure belli;* and the case of The Apollon, in this court, 9 W. 362, is relied on to establish this position. That case contains no doctrine leading justly to any such conclusion. It was a case of seizure under our revenue laws, and, in the opinion of the court, the point is examined how far probable cause constituted, in that case, a ground to exempt from damages. On that occasion, the court said that the argument had not distinguished between probable cause as applied to cases of capture *jure belli*, and as applied to cases of municipal seizures; and then proceeded to state the distinction. There was no intimation, that in cases of marine torts generally, or under laws authorizing the exercise to a limited extent of belligerent rights, or *quasi* belligerent rights, probable cause might not be a sufficient excuse. In the case of The Marianna Flora, at the last term, 11 W. 1, the very point was before the court, and it was in that case held that probable cause was a sufficient excuse for a capture under circumstances of hostile aggression at sea. Indeed, in cases of marine torts, arising under the general maritime law, probable

cause often is a complete excuse for the act, and always goes in mitigation of damages. In the admiralty, the award of damages always rests in the sound discretion of the court, under all the circumstances. The case of The St. Louis, in 2 Dods. 210, is a strong illustration of the doctrine. But, in cases like the present, where the pub-
[* 18] lic armed ships * of the United States are authorized to make captures to a limited extent, the authority so exercised by them must be deemed to stand upon the same analogy as captures strictly *jure belli*. And the doctrine of the prize courts as to the denial of damages, where there is probable cause for the capture, furnishes the proper rule to govern the discretion of the court. We are then of opinion that in the present case there was strong probable cause for the capture, and that the decree of the circuit court, so far as it awards damages to the claimants, ought to be reversed.

It remains only to remark upon one or two points made against the competency of some of the testimony in the cause. It is objected, that Lieutenant Gregory is not a competent witness, because he is, notwithstanding his release of his interest as captor, interested to defeat the claim for damages. However well founded this objection may be, as to his competency on the point of damages, having been admitted both in the district and circuit courts, as a witness, without objection, we think there was a waiver of the objection, and it cannot now be insisted on. As to the depositions of Captains Souther and Coffin, they were taken under commissions duly issued from the circuit court according to the rule of this court, and are, therefore, admissible upon the strictest principles.

9 P. 483; 12 P. 488; 2 H. 210; 6 H. 31; 18 H. 110.

Martin, Plaintiff in Error, *v.* Mott, Defendant in Error.

12 W. 19.

The act of February 28, 1795, (1 Stats. at Large, 424,) which confers power on the President to call forth the militia in certain exigencies, is a constitutional law, and the President is the exclusive and final judge whether the exigency has arisen.

A requisition by him is an order, and it is not necessary in pleading to set out the order; it is enough to aver that it was made.

Disobedience of an order of the President calling forth the militia, renders a citizen liable to trial by a court-martial.

Such a court-martial is not required to be organized according to the rules and articles of war, under the acts of congress, nor did its authority expire with the war.

The case is stated in the opinion of the court.

The *Attorney-general*, and *Coxe*, for the plaintiff in error.

D. B. Ogden, for the defendant in error.

STORY, J., delivered the opinion of the court. [*28]

This is a writ of error to the judgment of the court for the trial of impeachments and the correction of errors of the State of New York, being the highest court of that State, and is brought here in virtue of the 25th section of the Judiciary Act of 1789,[1] c. 20. The original action was a replevin for certain goods and chattels, to which the original defendant put in an avowry, and to that avowry there was a demurrer, assigning nineteen distinct and special causes of demurrer. Upon a joinder in demurrer, the supreme court of the State gave judgment against the avowant; and that judgment was affirmed by the high court to which the present writ of error is addressed.

The avowry, in substance, asserts a justification of the taking of the goods and chattels to satisfy a fine and forfeiture imposed upon the original plaintiff by a court-martial, for a failure to enter the service of the United States as a militia-man, when thereto required by the President of the United States, in pursuance of the act of the 28th of February, 1795. It is argued that this avowry is defective, both in substance and form; and it will be our business to discuss the most material of these objections; and as to others, of which no particular notice is taken, it is to be understood that the court are of opinion that they are either unfounded in fact or in law, and do not require any separate examination.

For the more clear and exact consideration of the subject, it may be necessary to refer to the constitution of the United States, and some of the provisions of the act of 1795. The constitution declares that congress shall have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions:" * and also "to provide for organizing, [*29] arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." In pursuance of this authority, the act of 1795 has provided, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." And like provisions are made for the other cases stated in the constitution. It has not been denied here, that the act of 1795 is within the constitu-

[1] 1 Stats. at Large, 85.

tional authority of congress, or, that congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

The power thus confided by congress to the President, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to [*30] whom the orders of the * President are addressed, may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If "the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are, (as it has been emphatically said they are,) natural incidents to the duties of superintending the common

defence, and of watching over the internal peace of the confederacy,"[1] these powers must be so construed as to the modes of their exercise as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the facts by competent proofs. Such a course would
* be subversive of all discipline, and expose the best disposed [* 31]
officers to the chances of ruinous litigation. Besides, in many instances. the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself, is strongly fortified. The words are, "whenever the United States shall be invaded, or be in imminent danger of invasion, &c., it shall be lawful for the President, &c., to call forth such number of the militia, &c., as he may judge necessary to repel such invasion." The power itself is confided to the Executive of the Union, to him who is, by the constitution, "the commander-in-chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow, as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion

[1] The Federalist, No. 29.

[*32] of certain facts, it is a sound rule of *construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

This doctrine has not been seriously contested upon the present occasion. It was indeed maintained and approved by the supreme court of New York, in the case of Vanderheyden *v.* Young, 11 Johns. Rep. 150, where the reasons in support of it were most ably expounded by Mr. Justice Spencer, in delivering the opinion of the court.

But it is now contended, as it was contended in that case, that notwithstanding the judgment of the President is conclusive as to the existence of the exigency, and may be given in evidence as conclusive proof thereof, yet that the avowry is fatally defective, because it omits to aver that the fact did exist. The argument is, that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power intrusted to the Executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the court, that this objection cannot be maintained. When the President exercises an authority confided to him by law, the presump-

[*33] *tion is, that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and *à fortiori*, this presumption ought to be favorably applied to the chief magistrate of the Union. It is not necessary to aver, that the act which he may rightfully do, was so done. If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury. This view of

the objection is precisely the same which was acted upon by the supreme court of New York, in the case already referred to, and, in the opinion of this court, with entire legal correctness.

Another objection is, that the orders of the President are not set forth; nor is it averred that he issued any orders, but only that the governor of New York called out the militia upon the requisition of the President. The objection, so far as it proceeds upon a supposed difference between a requisition and an order, is untenable; for a requisition calling forth the militia is, in legal intendment, an order, and must be so interpreted in this avowry. The majority of the court understood and acted upon this sense, which is one of the acknowledged senses of the word, in Houston *v.* Moore, 5 W. 1. It was unnecessary to set forth the orders of the President at large; it was quite sufficient to state that the call was in obedience to them. No private citizen is presumed to be conversant of the particulars of those orders; and if he were, he is not bound to set them forth in *hæc verba*.

The next objection is, that it does not sufficiently appear in the avowry, that the court-martial was a lawfully constituted court-martial, having jurisdiction of the offence at the time of passing its sentence against the original plaintiff.

Various grounds have been assigned in support of this objection. In the first place, it is said, that the original plaintiff was never employed in the service of the United States, but refused to enter that service, and that, consequently, he was not liable to the rules and articles of war, * or to be tried for the offence by [*34] any court-martial organized under the authority of the United States. The case of Houston *v.* Moore, 5 W. 1, affords a conclusive answer to this suggestion. It was decided in that case, that although a militia man, who refused to obey the orders of the President calling him into the public service, was not, in the sense of the act of 1795, "employed in the service of the United States," so as to be subject to the rules and articles of war; yet that he was liable to be tried for the offence under the 5th section of the same act, by a court-martial called under the authority of the United States. The great doubt in that case was, whether the delinquent was liable to be tried for the offence by a court-martial organized under state authority.

In the next place, it is said, the court-martial was not composed of the proper number of officers required by law. In order to understand the force of this objection, it is necessary to advert to the terms of the act of 1795, and the rules and articles of war. The act of 1795, s. 5, provides, "that every officer, non-commissioned officer, or private of the militia, who shall fail to obey the orders of the Presi-

dent of the United States," &c., shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court-martial." And it further provides, s. 6, "that courts-martial for the trial of militia shall be composed of militia officers only." These are the only provisions in the act on this subject. It is not stated by whom the courts-martial shall be called, nor in what manner, nor of what number they shall be composed. But the court is referred to the 64th and 65th of the rules and articles of war, enacted by the act of 10th of April, 1806, c. 20,[1] which provide, "that general courts-martial may consist of any number of commissioned officers from five to thirteen inclusively; but they shall not consist of less than thirteen, where that number can be convened without manifest injury to the service;" and that, "any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial when necessary."

[*35] Supposing these clauses applicable to the court-martial in question, it is very clear, *that the act is merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive. But the present avowry goes further, and alleges, not only that the court-martial was appointed by a general officer commanding an army, that it was composed of militia officers, naming them, but it goes on to assign the reason why a number short of thirteen composed the court, in the very terms of the 64th article; and the truth of this allegation is admitted by the demurrer. Tried, therefore, by the very test which has been resorted to in support of the objection, it utterly fails.

But, in strictness of law, the propriety of this resort may admit of question. The rules and articles of war, by the very terms of the statute of 1806, are those "by which the armies of the United States shall be governed;" and the act of 1795 has only provided, "that the militia employed in the service of the United States, (not the militia ordered into the service of the United States,) shall be subject to the same rules and articles of war as the troops of the United States;" and this is, in substance, reënacted by the 97th of the rules and articles of war. It is not, therefore, admitted, that any express authority is given by either statute, that such a court-martial as is contemplated for the trial of delinquents under the 5th section of the act of 1795, is to be composed of the same number of officers, organized in the same manner as these rules and articles contemplate for

[1] 2 Stats. at Large, 367.

persons in actual service. If any resort is to be had to them, it can only be to guide the discretion of the officer ordering the court, as matter of usage, and not as matter of positive institution. If, then, there be no mode pointed out for the formation of the court-martial in these cases, it may be asked, in what manner is such court to be appointed? The answer is, according to the general usage of the military service, or what may not unfitly be called the customary military law. It is by the same law that courts-martial, when duly organized, are bound to execute their duties, and regulate their modes of proceeding, in the absence of positive enactments. Upon
*any other principle, courts-martial would be left without [*36]
any adequate means to exercise the authority confided to
them; for there could scarcely be framed a positive code to provide for the infinite variety of incidents applicable to them.

The act of the 18th of April, 1814,[1] which expired at the end of the late war, was, in a great measure intended to obviate difficulties arising from the imperfection of the provisions of the act of 1795, and especially to aid courts-martial in exercising jurisdiction over cases like the present. But whatever may have been the legislative intention, its terms do not extend to the declaration of the number of which such courts-martial shall be composed. The 1st section provides: "That courts-martial to be composed of militia officers alone, for the trial of militia drafted, detached, *and* called forth, (not *or* called forth,) for the service of the United States, whether acting in conjunction with the regular forces or otherwise, shall, when necessary, be appointed, held, and conducted in the manner prescribed by the rules and articles of war, for appointing, holding, and conducting courts-martial for the trial of delinquents in the army of the United States." This language is obviously confined to the militia in the actual service of the United States, and does not extend to such as are drafted and refuse to obey the call. So that the court are driven back to the act of 1795 as the legitimate source for the ascertainment of the organization and jurisdiction of the court-martial in the present case. And we are of opinion that nothing appears on the face of the avowry to lead to any doubt that it was a legal court-martial, organized according to military usage, and entitled to take cognizance of the delinquencies stated in the avowry.

This view of the case affords an answer to another objection which has been urged at the bar, namely, that the sentence has not been approved by the commanding officer, in the manner pointed out in the 65th of the rules and articles of war. That article cannot, for

[1] 3 Stats. at Large, 134.

the reasons already stated, be drawn in aid of the argument; and the avowry itself shows that the sentence has been approved by the President of the United States, who is the commander-
[*37] in-chief, * and that there was not any other officer of equal grade with the major-generals by whom the court-martial had been organized and continued within the military district, by whom the same could be approved. If, therefore, an approval of the sentence were necessary, that approval has been given by the highest, and indeed only military authority competent to give it.

But it is by no means clear that the act of 1795 meant to require any approval of the sentences imposing fines for delinquencies of this nature. The act does not require it either expressly or by necessary implication. It directs, s. 7, that the fines assessed shall be certified by the presiding officer of the court-martial to the marshal, for him to levy the same, without referring to any prior act to be done, to give validity to the sentences. The natural inference from such an omission is, that the legislature did not intend in cases of this subordinate nature, to require any further sanction of the sentences. And if such an approval is to be deemed essential, it must be upon the general military usage, and not from positive institution. Either way, we think that all has been done which the act required.

Another objection to the proceedings of the court-martial is, that they took place, and the sentence was given, three years and more after the war was concluded, and in a time of profound peace. But the opinion of this court is, that a court-martial, regularly called under the act of 1795, does not expire with the end of a war then existing, nor is its jurisdiction to try these offences in any shape dependent upon the fact of war or peace. The act of 1795 is not confined in its operation to cases of refusal to obey the orders of the President in times of public war. On the contrary, that act authorizes the President to call forth the militia to suppress insurrections, and to enforce the laws of the United States in times of peace. And courts-martial are, under the 5th section of the act, entitled to take cognizance of, and to punish delinquencies in such cases, as well as in cases where the object is to repel invasion in times of war. It would be a strained construction of the act to limit the au-
[*38] thority of the court to the mere time of * the existence of the particular exigency, when it might be thereby unable to take cognizance of and decide upon a single offence. It is sufficient for us to say, that there is no such limitation in the act itself.

The next objection to the avowry is, that the certificate of the president of the court-martial is materially variant from the sentence itself, as set forth in a prior allegation. The sentence as there set

forth is, "and thereupon the said general court-martial imposed the sum of $96 as a fine on the said Jacob, for having thus failed, neglected, and refused to rendezvous and enter in the service of the United States of America, when thereto required as aforesaid." The certificate adds, "and that the said Jacob E. Mott was sentenced by the said general court-martial, on failure of the payment of said fine imposed on him, to twelve months' imprisonment." It is material to state that the averment does not purport to set forth the sentence in *hæc verba;* nor was it necessary in this avowry to allege any thing more than that part of the sentence which imposed the fine, since that was the sole ground of the justification of taking the goods and chattels in controversy. But there is nothing repugnant in this averment to that which relates to the certificate. The latter properly adds the fact which respects the imprisonment, because the certificate constitutes the warrant to the marshal for his proceedings. The act of 1795 expressly declares that the delinquents "shall be liable to be imprisoned by a like sentence, on failure of payment of the fines adjudged against them, for one calendar month for every five dollars of such fine." If indeed it had been necessary to set forth the whole sentence at large, the first omission would be helped by the certainty of the subsequent averment. There is, then, no variance or repugnance in these allegations; but they may well stand together.

Of the remaining causes of special demurrer, some are properly matters of defence before the court-martial, and its sentence being upon a subject within its jurisdiction is conclusive; and others turn upon niceties of pleading, to which no separate answers are deemed necessary. In * general, it may be said [*39] of them, that the court do not deem them well-founded objections to the avowry.

Upon the whole, it is the opinion of the court that the judgment of the court for the trial of impeachments and the correction of errors ought to be reversed; and that the cause be remanded to the same court, with directions to cause a judgment to be entered upon the pleadings in favor of the avowant.

5 H. 295; 7 H. 1; 18 H. 272.

Clark v. The Mayor, Aldermen, and Common Council of the City of Washington.

12 W. 40.

The clause in the charter of Washington, that the city shall have power "to authorise the drawing of lotteries," &c., confers a power to be exercised, by drawing the lotteries on account, and at the risk, of the city, which is bound to the holder of a ticket to pay the prize it drew.

ERROR to the circuit court for the District of Columbia.

This was an action of *assumpsit*, brought by the plaintiff in error, to recover of the defendants the amount of a prize drawn in a lottery called "the fifth class of the national lottery." A verdict was found for the plaintiff in the court below, subject to the opinion of the court, on a case agreed, on which judgment was rendered for the defendants, and the cause was brought by writ of error to this court. The questions decided, and the facts upon which they depended, are sufficiently stated in the opinion of the court.

The *Attorney-General* and *Webster*, for the plaintiff.

Jones, for the defendants.

[*52] *MARSHALL, C. J., delivered the opinion of the court.

This cause depends on the liability of the corporation to pay the ticket on which the suit was instituted. In considering this question, that part of the charter which contains a grant of power on the subject of lotteries, the ordinances of the corporate body in execution of the power, and the proceedings of its agents, must be reviewed.

The charter enacts,[1] "that the corporation shall have full power and authority" "to authorize the drawing of lotteries, for effecting any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish; provided, that the amount to be raised in each year shall not exceed the sum of $10,000. And provided also, that the object for which the money is intended to be raised, shall be first submitted to the President of the United States, and shall be approved of by him."

Some doubt has been expressed whether this power is to be exercised by drawing the lottery, on account and at the risk of the corporation, or by selling the privilege to individuals, and authorizing them to draw it on their own account. This doubt is founded on the word "authorize." Congress, we are told, has not granted the power to draw lotteries, but to "authorize" their being drawn.

[* 53] *We cannot admit the correctness of this criticism. We do not admit the justice of that construction which denies to the corporation the power of causing the lottery to be drawn on its own account. A corporation aggregate can legislate within its prescribed limits, but can carry its laws into execution only by its agents. Any legislative act directing a lottery to be drawn, is literally an act "to authorize the drawing of lotteries."

The object for which the lottery may be authorized is, "any important improvement in the city." Its produce is to come in aid of the ordinary funds or revenue thereof; and "the amount to be raised

[1] 2 Stats. at Large, 725.

in each year shall not exceed the sum of $10,000." The language of the charter is, not that the sum to be brought into the treasury of the city shall not exceed the sum of $10,000, but that "the amount to be raised shall not exceed that sum." This language, it is admitted, comprehends the net proceeds of the lottery, but it comprehends all those net proceeds, and does not allow a partition of profit, so as to retain $10,000 for the treasury, and reserve a residue for others. The single object for which the lottery can be drawn, is "any important improvement in the city," not the emolument of individuals. The motive with congress for this restriction on the amount, is not to limit the sum to come into the city treasury, but to limit the extent of gaming, which the corporation may authorize. Congress must have perceived that to bring $10,000 into the treasury, either "the amount raised must exceed that sum," or the lottery must be drawn on account of the city; for no man will purchase a lottery from which he can make nothing.

The counsel of the plaintiff in error have remarked, and the remark is certainly entitled to attention, that, in describing the power, congress has used no words indicating the idea that the corporation might grant or sell lotteries. "To authorize the drawing of lotteries," is, as has been said, an appropriate term for a corporate act, instituting a lottery for the benefit of the city; but if the granting a lottery to others, or a sale of the privilege to others, had been in the mind of congress, it is to be presumed that some words would have been used, indicating the idea.

*There is great weight, too, in the argument that it is a [*54] trust, and an important trust, confided to the corporation itself, for the purpose of "effecting important improvements in the city, and ought, therefore, to be executed under the immediate authority and inspection of the corporation. It is reasonable to suppose that congress, when granting a power to authorize gaming, would feel some solicitude respecting the fairness with which the power should be used; and would take as many precautions against its abuse, as was compatible with its beneficial exercise. Accordingly, we find a limitation on the amount to be raised, and on the object for which the lottery may be authorized. It is to be for "any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish; and is subjected to the judgment of the President of the United States. The power thus cautiously granted is deposited with the corporation itself, without an indication that it is assignable. It is to be exercised, like other corporate powers, by the agents of the corporation, under its control. While it remains where congress has placed it, the character of the corporation affords

some security against its abuse; some security that no other mischief will result from it than is inseparable from the thing itself. But if the management, control, and responsibility may be transferred to any adventurer who will purchase, all the security for fairness, which is furnished by character and responsibility, is lost.

We think, then, that the most obvious if not the exclusive construction of the charter is, that the lotteries to be authorized by the corporation are to be drawn under its superintendence, and on its own account.

We will next advert to the measures which have been adopted for carrying this power into execution.

Ten successive resolutions were passed, the first approved on the 23d of November, 1812, and the last on the 21st of May, 1821, each of them for raising the sum of $10,000, by lottery, for particular improvements mentioned in the resolution.

The ordinance of the 24th of July, 1815, which was passed for carrying the first three of these resolutions into effect, con-
[*55] templates and authorizes lotteries to be drawn *entirely under the management, for the benefit, and on the responsibility of the corporation. Seven managers are appointed by the ordinance, and they or a majority are authorized to employ agents, fill up vacancies in their own body, and to do every act which may be necessary for carrying its provisions into effect.

The ordinance passed on the 17th of November, 1818, for carrying the 4th, 5th, 6th, and 7th resolutions into effect, authorizes the mayor to appoint seven managers, whose duty it was to agree on a scheme, to sell the said lottery, or dispose of the tickets to the best advantage. A proviso is inserted that, should the lottery be sold, the purchasers may make the scheme; but the ordinance enacts generally, (and the enactment makes no distinction between a sale of the lottery itself, and a disposition of the tickets,) that it shall be the duty of the managers to attend diligently to the drawing of the lottery, and to pay the fortunate adventurers for prizes drawn by them. The ordinance, however, adds the further duty of paying over the balance, after deducting all necessary expenses, into the city treasury. From this it has been inferred that these provisions are made for the contingency that the tickets should be disposed of for the benefit of the city, and are entirely inapplicable to the contingency of an entire sale. Certainly, in the event of an entire sale, the balance, after deducting all necessary expenses, would not be payable into the treasury, unless we suppose it to mean the balance of the sum for which the lottery might be sold. But this is the only part of the clause which is inapplicable to a lottery sold out, and drawn for the benefit of the purchaser.

In October, 1819, the managers appointed under the act of 1815 were empowered to sell and dispose of the lotteries to which that act refers, or so much thereof as yet remains to be drawn, in such classes, and on such terms and conditions, as shall appear to them right and expedient. The duty of the managers to superintend the drawing, and to pay the prizes, is not changed by this act, unless the mere power to sell implies such change.

The managers sold to David Gillespie, of New York, in pursuance of the acts of 1815 and 1819, a lottery * denomi- [*56] nated the 5th class of the Grand National Lottery, for the sum of $10,000, to be paid before the commencement of the drawing the said lottery or class; and articles of agreement in pursuance thereof were executed on the 14th day of May, 1821. The ticket held by the plaintiff is in this class.

On the 22d of the same month an ordinance was passed, authorizing the managers to appoint a president, whose duty it should be, in addition to the duties imposed by the acts of 1815 and 1819, to sign all contracts, with the concurrence of a majority of the said managers, and to sign all the lottery tickets in every scheme or schemes sold by them.

This ordinance recognizes the duties prescribed by the acts of 1815 and 1819. Its 2d section allows each of the managers of the city lotteries three dollars for each day he has been or shall be employed; and the 7th section enacts that this compensation, "except for the class now contracted for," shall be provided for and paid out of the proceeds of lotteries hereafter contracted for.

This act is understood to recognize it as a part of the duty of the managers, to continue their superintendence of the drawing of the very class which had been sold, and which comprehended the ticket that drew the prize for which this suit is brought.

The defendant has excepted to the admissibility, as well as sufficiency, of the testimony offered by the plaintiff in the circuit court, and the objection is made in general terms. We presume, however, that it cannot apply to the charter, or to the resolutions and ordinances of the corporation. Nor do we suppose that any exception was intended to be made to the testimony which establishes the ownership of the tickets, or to the admissibility of the deposition of Mr. Webb. The first document on which a question can arise is the ticket itself. Is this admissible in a suit against the corporation.

In considering this question, we must inquire into the connection between the ostensible managers and the corporation.

The persons who were held out as managers to superintend the drawing of the lottery comprehending this * ticket, [*57]

were, with one exception, the same persons who were appointed in the ordinance of 1815, as managers for the lotteries established by that act. The name of R. C. Weightman is substituted for that of S. N. Smallwood. No other change appears. It is in proof that S. N. Smallwood was elected mayor; and, as the managers have, by the ordinance, a right to fill up vacancies in their own body, their acting uniformly with R. C. Weightman, is a proof that they had chosen him to fill the vacancy made by Mr. Smallwood.

But it is contended that this lottery was drawn under the act of 1818, and there is no proof that the individuals who appeared and acted as managers had any authority under that act.

There is undoubtedly some confusion in this part of the case, and there is not much difficulty in ascribing it to its real cause. The mayor was authorized by the ordinance of 1818 to appoint managers to carry that act into execution, and the probability is that he appointed the persons who were in office under the appointment of the corporation. The fitness of this proceeding renders it probable; and the subsequent proceedings of the corporation itself turn this probability almost into certainty. In a case where written evidence of appointment is not in the power of the plaintiff, if, indeed, it exists, circumstances must be relied on to prove the fact, should it be deemed necessary.

The act of 1821 takes no notice of any appointment under the act of 1818, and makes it the duty of the managers created under the act of 1815, to elect a president to sign all contracts, "and to sign all the lottery tickets, in every scheme or schemes sold by the said managers." Class No. 5 was then sold by these managers. Lotteries, under seven resolutions, to raise the sum of $70,000, were either sold or for sale, either in mass or in detail, under the acts of 1815, 1818, and 1819. The language of this ordinance appears to extend to them all; and if it does, certainly admits the authority of the managers appointed under the act of 1815, to extend to all The 7th section of the act of 1821, which provides the fund for their compensation, expressly excepts "the class now contracted for."

[*58] The contract for the 5th class was executed a few days before the passage of this ordinance, and it is difficult to resist the conviction that the allusion is to this contract. These provisions in the ordinance of 1821 go far to establish the authority of these managers in this very case. The receipt of the purchase-money under this very contract, is also a strong circumstance in support of the authority of those who made it. But we think the corporation has waived all exception to the authority of the managers, by producing and relying on their contract for the sale

of this very lottery. That body defends itself from the claim of the plaintiff, by alleging that their managers sold this lottery. Their attorney produces the contract in court, and insists that it exempts his clients from all liability. Can he, in the same cause, deny the authority of those who made it? We think the connection between the managers and the corporation is established beyond controversy.

If the persons who made this contract are the persons appointed under the authority of the corporation, as managers for class No. 5, no doubt exists whether the ticket has emanated from them. The ordinance of the 21st of May, 1821, authorizes them to appoint a president from their own body, whose duty it shall be "to sign all the lottery tickets in every scheme or schemes sold by the said managers." The scheme for the 5th class was annexed to the agreement between Gillespie and the managers, and has been produced in court with it. Mr. Webb proves that the ticket 2929, on which this suit was brought, was signed by T. H. Gillis, whose name is subscribed to it; and that T. H. Gillis was, at that time, president of the board of managers.

It is then satisfactorily proved that the ticket was issued and sold under the authority of the corporation, and was consequently admissible in a suit brought against that body. The remaining inquiry is, does it bind the defendants to pay the prize it has drawn in the lottery?

Had the managers, instead of selling the whole scheme in mass, sold the tickets in the usual manner, and received the purchase-money of the several tickets, instead of a sum in gross, for the use of the city, this question could not have arisen. No person would have denied the liability of the *corporation. The [*59] sole inquiry then is, whether the agreement of the 14th of May, 1821, has discharged this liability.

If the exposition of the charter, in the early part of this opinion, be correct, this question is answered. If the corporate body was not empowered to vest in an individual the independent right of drawing lotteries for himself, and on his own responsibility, uncontrolled by the city government, then the agreement with Gillespie can operate only as a sale of the profits for a given sum, leaving the responsibility of the corporation as if that agreement had never been made. The contract would be between the corporation and the ticket purchaser; and, although the price of the ticket was paid to Gillespie, yet the corporation had consented that he should receive it for the purpose of performing their engagements to such ticket holders as should draw prizes, and had consented to receive from him $10,000, as full compensation for that portion of it which would remain after satisfying those engagements.

If the charter did grant the power to the corporation which is now claimed, the whole transaction must be considered, in order to determine its actual character. We must inquire whether the corporation has so acted as to divest itself entirely of all connection with, control over, and responsibility for, this lottery, and substituted the purchaser in their place.

In its origin, the lottery was a city lottery. It was to be managed by persons appointed by the city, drawn under their superintendence, and, so far as the public was informed, for the benefit and on the responsibility of the city. Tickets were prepared under the authority of the corporation, bearing on their face the city improvements for which the lottery was to be drawn, the names of the managers appointed by the city, and the words "national lottery," and "by authority of congress." Before these tickets were disposed of in the usual way, the managers entered into an agreement with David Gillespie, to sell him a lottery denominated the fifth class of the Grand National Lottery, to be drawn according to the scheme annexed, at the costs of the said Gillespie, except the expense of drawing the same.

[*60] The stipulations of this contract show that it was not intended to dissolve the connection between the city and the lottery, and to give the absolute property in it and control over it to Gillespie; nor to exhibit him to the world as its owner, with whom alone the purchasers of tickets were to contract, and to whom the fortunate adventurers were to look for the payment of their prizes. He engages to draw the lottery in the city of Washington, in the presence of the managers; to finish the drawing within two years from the date of the contract; to pay all the prizes within sixty days from its completion; to provide two clerks to assist at the drawing; and to execute, within thirty days, and before the drawing should commence, a bond to the managers, with such security as they should approve, in the penal sum of $35,000, conditioned for the faithful drawing of the lottery, according to the scheme, for the punctual payment of the prizes, and for conducting the lottery fairly and honestly, according to the scheme, and according to the true intent and meaning of the acts of the aldermen and board of common council.

A bond was executed in pursuance of this agreement.

These provisions are in the spirit of a contract made to secure the city from the hazard of a continuing responsibility; a responsibility which they were induced to continue by the consideration of the $10,000 paid by Gillespie. Why else stipulate that the lottery should be drawn in the city? Why that it should be completed

within a limited time, and drawn in the presence of the managers appointed by the corporation? Why that the prizes should be paid, and why take a bond to the managers, conditioned, among other things, for their payment? Had the corporation felt no further interest in the lottery, the purchaser might have been permitted to exercise his own discretion with the article he had purchased, and to appear to the world as its owner. But the nature of the case justifies the opinion that such a sale could not have been made. No purchaser could have been found who would have given $10,000 for the privilege of drawing a lottery on his own account and responsibility, having no connection with the city. The probability is strong, that the aspect which the lottery still continued to bear was a necessary part of the contract, *without which [*61] it would never have been made, and that these precautions were used to diminish the hazard of a responsibility which was unavoidably continued. We find the appearance of this responsibility carefully preserved by the corporation itself and by its managers. In the ordinance of the 22d of May, 1821, it is enacted that the tickets shall be signed by the president of their board of managers, and that their managers shall receive a daily allowance for attending the drawing of the lottery. The tickets were signed in conformity with this ordinance.

The manner in which the lottery was advertised, confirms the opinion that the contract of sale was made with a view to the continuing the responsibility of the city. Exception is taken to the admission of these advertisements, and we will not affirm that their appearance in the city papers, one of which was published by a member of the corporate body, is evidence that the publication was made by authority of the managers; but the advertisements prove the fact that the lottery was ushered to the world in the form and character which those advertisements represent. It is proved that they were published in two papers in the city, in the National Intelligencer from the 18th of May, 1821, and in the Washington City Gazette from the 17th of July, 1821, until the completion of the lottery. These advertisements exhibited the scheme which was agreed on between the managers and Gillespie, which was annexed to their contract; gives notice of the time when the drawing would take place; of the number of days to be employed in the drawings, and that they would be completed as soon as possible, under the superintendence of the managers. To this advertisement the names of the managers are annexed. The lottery is drawn in pursuance of it, and the managers superintend the drawing. In its progress a postponement takes place. An advertisement purporting to be signed by

three of the managers appears, giving notice of this postponement, and of its cause. Another advertisement soon follows, purporting to be signed by the president, by order of the board, giving notice when the drawing would recommence. It does recommence under the superintendence of the managers.

[*62] *It is not, we think, within the compass of human credulity, to believe that the managers did not see these advertisements, or did not believe that they would be received by the public as being accredited by their names. Not to contradict them was to sanction them. To appear in pursuance of them, and superintend the drawings of which they had given notice, was to adopt them. It is not to be believed that this concurrence of circumstances, all tending to assure the public that these advertisements were published by authority of the managers, could have been produced by accident. To sit daily superintending the drawing of a lottery, in pursuance of notice published every day under their names, verifies that publication, and must be considered as a ratification of it.

The proceedings which took place between the managers and Gillespie, after the contract, still further corroborates the opinion that this continuing responsibility of the corporation, which was held out to the public, was not a fraudulent representation for the purpose of enabling Gillespie to sell the tickets, but a representation of the fact as then understood.

It appears, from the deposition of Mr. Webb, that all the tickets, amounting to 50,000, were put into the possession of Gillespie; but these tickets were not vendible until signed by the president of the board of managers. Those unsigned could no more be used by him than if they had not been in his possession. As soon as the scheme was agreed on, three or four thousand tickets were signed, and afterwards tickets were occasionally signed, so as to make the additional number of 17,208. Why were these tickets thus withheld from him, if he had become the absolute and unconditional proprietor of them? The conduct of the managers, as disclosed in the subsequent part of Webb's deposition, will inform us. He says that, some time after the drawing of the lottery commenced, the president of the managers refused to sign tickets, unless an equivalent in prize tickets, either paid and taken in by Gillespie, or drawn on hand, or the notes of individuals which Gillespie had taken, payable to himself, for tickets sold, were deposited with them; and, accordingly, when the

[*63] witness, as the *clerk and agent of Gillespie, presented tickets to be signed, he was obliged, at the same time, to deposit such prize tickets or promissory notes; and, on some occasions, when tickets were called for and wanted, the managers have

refused to sign the same for want of such equivalent; that the amount of such prize tickets so deposited with the managers, was about the sum of $141,779; that the managers, on such occasions, objected to trusting Gillespie with the disposal of tickets much beyond the penalty of his bond; and the witness understood, from the conversations and transactions between the parties at the time, that this precaution arose from doubts which had been circulated respecting Gillespie's solvency. The whole number of tickets actually signed was 30,960. This conduct of the managers is explained by the supposition that they considered the city as still responsible for prizes, but is irreconcilable with the idea of an entire transfer of responsibility to Gillespie. Such entire transfer would have entitled him to the free use of all the tickets. That the parties who made the contract so understood it, would go far in its construction, were it even in the power of the corporation to transfer its responsibility.

We think, then, that the contract of May, 1821, can be considered only as a sale of the profits of the lottery, and could not, under all the circumstances of the case, affect the responsibility of the corporation. The ticket was in fact what it purports on its face to be, a ticket in the National Lottery, by authority of congress, sold under the direction of the corporation, and signed by the person who was authorized by an act of the corporate body to sign it. It asserts that it shall entitle the possessor to such prize as may be drawn to its number; and this is, we think, in such a case, the promise of the corporation, made by its authorized agent, to pay such prize.

The judgment of the circuit court, then, on the verdict found in the cause, and on the case agreed, to which that verdict refers, ought to have been for the plaintiff. The judgment is to be reversed, and the cause remanded to the circuit court, with directions to enter judgment for the plaintiff.

5 P. 391, 641; 10 H. 511; 18 H. 480.

The President, Directors, and Company of the Bank of the United States *v.* Dandridge and others.

12 W. 64.

The acceptance of a cashier's bond by the board of directors of the bank, may be proved, without the production of a written record, by the facts that the person acted as cashier, and was recognized as such by the directors, and that the bond was required to be given as a condition precedent to his so acting, and was actually among the corporate documents.

If a provision in a charter or by-law be directory merely, a deviation from it cannot be taken advantage of by third persons.

This cause was argued by the *Attorney-General* and *Webster*, for the plaintiffs, and by *Tazewell*, for the defendants.

STORY, J., delivered the opinion of the court.

This is a writ of error to the circuit court for the district of Virginia. The original action was debt on a bond, purporting to be signed by Dandridge, as principal, and Carter B. Page, Wilson Allen, James Brown, jr., Thomas Taylor, Harry Heth, and Andrew Stevenson, as his sureties, and was brought jointly against [*65] all the parties. The condition *of the bond, after reciting that Dandridge had been appointed cashier of the office of discount and deposit of the Bank of the United States, at Richmond, Virginia, was, that if he should well, and truly, and faithfully discharge the duties and trust reposed in him as cashier of the said office, then the obligation to be void, otherwise to remain in full force and virtue. The declaration set forth the condition, and assigned various breaches. Dandridge made no defence; and the suit was abated, as to Heth, by his death. The other defendants severed in their pleas. It is not thought necessary to state the pleadings at large; it is sufficient to state that Stevenson and Allen pleaded, among other pleas, *non est factum* generally, and also special pleas of *non est factum*, on which issues were joined; and that all the defendants, in various forms, pleaded that the instrument was not the deed of Stevenson; and further pleaded that the bond had never been approved, according to the provisions of the 30th article of the rules and regulations of the bank. Issues were also taken on these pleas; and the cause came on for trial upon all the issues of fact.

At the trial, evidence was offered for the purpose of establishing the due execution of the bond by the defendants, and particularly by Stevenson and Allen, and its approval by the plaintiffs. The evidence was objected to on behalf of the defendants, as not sufficient to be left to the jury, to infer a delivery of the bond, and the acceptance and approval thereof by the directors of the bank, according to the provisions of their charter; and the objection was sustained, the court being of opinion that although the scroll affixed by Allen to his name is, in Virginia, equivalent to a seal of wax, and although proof of the handwriting of Stevenson, and the bond being in possession of the plaintiffs, and put in suit by them, and the introduction of Dandridge into the office of cashier, and his continuing to act in that office, would, in general, be *prima facie* evidence to be submitted to the jury as proof that the bond was fully executed and accepted; yet it was not evidence of that fact, or of the obligation of the bond in this case; because, under the act of congress[1] incorporating the

[1] 3 Stats. at Large, 266.

Bank of the United States, the bond ought to be satisfactory to the board of directors, before *the cashier can [*66] legally enter on the duties of his office, and consequently before his sureties can be responsible for his non-performance of those duties; and that the evidence in this case did not prove such acceptance and approbation of the bond as is required by law for its completion. This opinion constitutes the subject-matter of the first bill of exceptions.

Further evidence was then offered by the plaintiffs for the same purpose, the particulars of which are not now necessary to be enumerated; to which the defendants took various objections, and contended, among other things, that the whole of the evidence, if legal, was not sufficient to go to the jury, upon which to infer the delivery of the paper as the act and deed of the defendants, and its acceptance and approbation by the directors of the bank, pursuant to their charter; which objection was sustained, and the court excluded the whole and every part of the said evidence from the jury, being of opinion that the board of directors keep a record of their proceedings, which record or a copy of it, showing the assent of the directors to this bond, was necessary to show that such assent was given; and if such assent had not been entered on the record of the proceedings of the said directors, the bond was ineffectual, and no claim in favor of the plaintiffs could be founded thereon against the defendants in these issues. This opinion of the court constitutes the subject-matter of the second bill of exceptions.

It has become the duty of this court, upon the present writ of error, to decide whether these opinions of the circuit court, or either of them, can be maintained in point of law.

It is material to state that the rejection of the evidence did not proceed upon the ground that it was of a secondary nature, leaving behind, in the possession of the plaintiffs, evidence of a higher and more satisfactory nature. On the contrary, the whole structure of the case shows, that there was in the understanding of both the parties, no record ever made of the approval or acceptance of the bond in question; and the principal controversy was, whether it could be established by any evidence short of such record proof.

*The propositions maintained by the circuit court were in [*67] substance these: First, that the cashier could not legally enter upon the duties of his office, or make his sureties responsible for his non-performance of those duties, before his official bond was accepted as satisfactory by the board of directors, according to the terms of the charter. Secondly, that such acceptance could be

established only by proof drawn from the records of the board of directors; and if no record had been kept of such assent and acceptance, the bond was ineffectual, and no secondary evidence could be admitted to establish the fact.

The last proposition will be first considered. The correctness of it, in a great measure, depends upon the soundness of the distinction taken between the acts of private persons and the acts of corporations. It is admitted in the opinion of the circuit court, that the evidence offered would, in common cases between private persons, have been *primâ facie* evidence, to be submitted to the jury, as proof that the bond was fully executed and accepted. But it is supposed that a different rule prevails in cases of corporations; that their acts must be established by positive record proofs; and that no presumptions can be made in their favor, of corporate assent or adoption, from other circumstances, though in respect to individuals the same circumstances would be decisive. The doctrine, then, is maintained from the nature of corporations, as distinguished from natural persons; and from the supposed incapacity of the former to do any act not evidenced by writing; and if done, to prove it except by writing.

Little light can be thrown on this subject by considerations drawn from corporations existing by the common law, or dependent upon prescription. To corporations, however erected, there are said to be certain incidents attached, without any express words or authority for this purpose; such as the power to plead and be impleaded, to purchase and alien, to make a common seal, and to pass by-laws. Com. Digest, Franchise, F. 10, 13. In ancient times, it was held that corporations aggregate could do nothing but by deed
[*68] under their common seal. *But this principle must always have been understood with many qualifications; and seems inapplicable to acts and votes, passed by such corporations at corporate meetings. It was probably, in its origin, applied to aggregate corporations at the common law, and limited to such solemn proceedings as were usually evidenced under seal, and to be done by those persons who had the custody of the common seal, and had authority to bind the corporation thereby, as their permanent official agents. Be this as it may, the rule has been broken in upon in a vast variety of cases, in modern times, and cannot now, as a general proposition, be supported. Mr. Justice Bayley, in Harper *v.* Charlesworth, 4 Barnw. & Cresw. 574, said: " A corporation can only grant by deed; yet there are many things which a corporation has power to do otherwise than by deed. It may appoint a bailiff, and do other acts of a like nature." And it is now firmly established, both in England and America, that a corporation may be bound by a prom-

ise, express or implied, resulting from the acts of its authorized agent, although such authority be only by virtue of a corporate vote, unaccompanied with the corporate seal.

But whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself. The doctrine of this court, in Head *v.* The Providence Insurance Company, 2 C. 127, on this subject, is believed to be entirely correct. It was there said by the chief justice, in delivering the opinion of the court, that "without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes." In that case, the act of incorporation prescribed the mode in which contracts should be made, in order to bind the corporation, which was not complied *with, and the [*69] court held that there was no binding contract, for the corporation could only act in the manner prescribed by law; and when their agents do not clothe their proceedings with those solemnities which are required by the incorporating act to bind the company, they cannot be deemed as more than proposals or preparatory negotiations. We do not perceive any thing in this doctrine which fairly admits of controversy. But this case has been pressed upon us, at the present argument, as justifying, to its full extent, the reasoning of the defendants on the present occasion. The question there was not, whether every corporate act must be evidenced by writing; but whether certain acts, which by law were to bind only when done and verified in a particular manner, ought to bind, although those forms were not adopted.

We do not admit, as a general proposition, that the acts of a corporation, although in all other respects rightly transacted, are invalid, merely from the omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence, or to give them an obligatory force. If the statute imposes such a restriction, it must be obeyed; if it does not, then it remains for those who assert the doctrine to establish it by the principles of the common law, and by decisive authorities. None such have, in our judgment, been produced.

By the general rules of evidence, presumptions are continually

made, in cases of private persons, of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence and upholding transactions intimately connected with the public peace and the security of private property, indulges its own presumptions. It presumes that every man, in his private and official character, does his duty, until the contrary is proved; (see Rex *v.* Hawkins, 10 East, 211; Powell *v.* Milbourne, 3 Wilson, 355; Hartwell *v.* Root, 19 Johns. 345;) it will presume that all things are rightly [* 70] done, unless the circumstances of the case overturn this *presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium.* Thus, it will presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matters collateral to that title shall be deemed to have been done; as, for instance, if a grant or feoffment has been declared on, attornment will be intended, and that deeds and grants have been accepted, which are manifestly for the benefit of the party. The books on evidence abound with instances of this kind, and many of them will be found collected in Mr. Starkie's late valuable Treatise on Evidence. 3 Starkie's Evid. part 4, 1234, 1241, 1248, and n. 1250, &c.

The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as cashier of a bank, and is recognized by the directors or by the corporation as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment. In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them as matters of right or matters of duty.

*It may not be without use to advert to a few cases where [* 71] corporate acts have been the subject of presumptions. In the first place, we may advert to the known fact that a charter may be presumed to have been given to persons who have long acted as a corporation, and assumed the exercise of the powers of a corporate body, whether of an ordinary or extraordinary nature. This is the case in respect to all corporations existing by presumption. Yet the very case supposes that no written proof can be adduced of a charter or of a vote of the corporators to accept the charter. Yet, both a charter and acceptance are vital to the existence of the corporation. They are, however, presumed, not merely from the lapse of time, but from the continued exercise of corporate powers, which presuppose their existence. So in relation to the question of acceptance of a particular charter by an existing corporation or by corporators already in the exercise of corporate functions, the acts of the corporate officers are admissible evidence from which the fact of acceptance may be inferred. It is not indispensable to show a written instrument or vote of acceptance on the corporation books. It may be inferred from other facts which demonstrate that it must have been accepted. Upon this point it is not necessary to do more than to refer to the general course of reasoning in The King *v.* Amory, 1 Term Rep. 575; S. C. 2 Term Rep. 515, as applied to the circumstances of that case. See also Newling *v.* Francis, 3 Term Rep. 189; Butler *v.* Palmer, Salk. 191. In Wood *v.* Tate, 5 Bos. & Pull. 247, which was replevin, upon a distress made by the bailiff of the borough of Morpeth, for rent, it appeared in evidence that the tenant went into possession under a lease void for not being executed under the corporate seal, even if made by proper officers; yet the court held that though the lease was void, the tenant was to be deemed tenant from year to year under the corporation, and his payment of rent from time to time to the officers of the corporation, (though not proved to be by virtue of any written authority,) was sufficient proof of tenancy under the corporation, on which the corporation *might distrain [* 72] for the rent in arrear. In Doe *v.* Woodman, 8 East 228, where certain premises had been demised by the plaintiff to the corporation, as tenant from year to year, at an annual rent, though it does not appear in what manner the demise had been accepted, except by the payment of rent by the bailiff, as such, it seems to have been taken for granted that it was proper evidence of a holding by the corporation. In Magill *v.* Kauffman, 4 Serg. & Rawle, 317, which was an ejectment for land claimed by a Presbyterian congregation, before incorporation, under a purchase by their trustees, and after their incorporation claimed in their right as a corporation, the

supreme court of Pennsylvania held that evidence of the acts and declarations of the trustees and agents of the corporation, both before and after the incorporation, while transacting the business of the corporation, and also evidence by witnesses of what passed at the meetings of the congregation when assembled on business, were admissible to show their possession of the land and the extent of their claim of its boundaries. This must necessarily have proceeded upon the ground that the acts of corporate agents, and even of aggregate bodies, corporate or unincorporated, might be established, independent of written minutes of their proceedings.

In respect to grants and deeds beneficial to a corporation, there seems to be no particular reason why their assent to and acceptance of the same may not be inferred from their acts, as well as in the case of individuals. Suppose a deed poll granting lands to a corporation, can it be necessary to show that there was an acceptance by the corporation by an assent under seal, if it be a corporation at the common law; or by a written vote, if the corporation may signify its assent in that manner? Why may not its occupation and improvement, and the demise of the land by its agents, be justly admitted, by implication, to establish the fact in favor and for the benefit of the corporation? Why should the omission to record the assent, if actually given, deprive the corporation of the property which it gained in virtue of such actual assent? The validity of such a grant depends upon the acceptance, not upon the mode, by [* 73] which * it is proved. It is no implied condition that the corporation shall perpetuate the evidence of its assent in a particular way. At least, if it be so, we think it is incumbent on those who maintain the affirmative, to point out the authorities which sustain it. None such have been cited at the bar. On the contrary, there are highly respectable decisions, made upon great consideration, which assert a different doctrine. The case of the Proprietors of the Canal Bridge *v.* Gordon, 1 Pick. 297, is directly in point. There the object was to impose an onerous duty, and to discharge or limit the right of toll of the plaintiffs; and the court held, that the corporation could bind itself, and did in fact, in that case, bind itself to a surrender of its valuable rights, by implications from corporate acts, without vote or deed. The learned chief justice of Massachusetts, on that occasion, in delivering the opinion of the court, said: "It is true that the acts, doings, and declarations of individual members of the corporation, unsanctioned by the body, are not binding upon it; but it is equally true that inferences may be drawn from corporate acts, tending to prove a contract or promise, as well as in the case of an individual; and that a vote is not always necessary to establish such

contract or promise. This has been settled in several cases in this country and in England." And afterwards, addressing himself to the facts of that case, he added: "The question, then, is narrowed to this: Have the proprietors of the canal bridge assented to this proposition, and acted under it? We find no vote to this effect; but we do find that the cross bridge was suffered to unite with theirs, pursuant to this proposition, and that for four years all were suffered to pass without toll, who came from Charlestown to Cambridge, or *vice versâ*. Now, corporations can be bound by implication as well as individuals, as has been before stated; and no acts could be stronger to show an assent to a proposition, an agreement, or bargain, than those which have been mentioned." Nor was this doctrine new at that time in that court. It may be clearly inferred from the prior cases of The President, &c., of the Salem Bank *v.* The President, &c., of the Gloucester Bank, 17 Mass. 1, and Foster *v.* The President, &c., of the Essex * Bank, Ib. 479. And it [* 74] has been more recently confirmed, in The Episcopal Charitable Society *v.* The Episcopal Church in Dedham, 1 Pick. 372. It may, therefore, be considered as conclusively settled in Massachusetts. The case of The Bank of Columbia *v.* Patterson's Adm., in this court, 7 C. 299, did not call for any expression of opinion upon the particular point now under consideration; but the court there held, that, from the evidence in that case, the jury might legally infer an express or an implied promise of the corporation. The court there said: "The contracts were for the exclusive use and benefit of the corporation, and made by their agents for purposes authorized by the charter. The corporation proceed, on the faith of those contracts, to pay money, from time to time, to the intestate. Although, then, an action might have lain against the committee personally, (for the contract was a personal contract by them, under their private seals,) upon their express contract, yet, as the whole benefit resulted to the corporation, it seems to the court that from this evidence the jury might legally infer that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the intestate had accepted their engagement." Here, then, secondary evidence and presumptive proof was admitted in a suit against the corporation to fix its responsibility. A vote of the corporation was presumed from other acts, though there was no proof of such a vote being on record. If the corporation had shown that no such vote had been on record, would the presumption have been completely repelled? Would the omission of the corporation to record its own doings, have prejudiced the rights of the party relying upon the good faith of an actual vote of

the corporation? If such omission would not be fatal to the plaintiff in suits against the corporation, (as in our opinion it would not be,) it establishes the fact that acts of the corporation not recorded may be established by parol proofs, and, of course, by presumptive proofs. In reason and justice, there does not seem any solid ground why a corporation may not, in case of the omission of its officers to preserve a written record, give such proofs to support its rights, [*75] as would be *admissible in suits against it to support adverse rights. The true question in such case would seem to be, not which party was plaintiff or defendant, but whether the evidence was the best the nature of the case admitted of, and left nothing behind in the possession or control of the party higher than secondary evidence. The case of Dunn *v.* St. Andrew's Church, 14 Johns. 118, proceeded upon like reasoning. There the plaintiff had performed services as clerk of the church for the corporation, for which he had received some payments. The records of the corporation contained entries of the payment of moneys, at several times, to the plaintiff, for his services; but no resolution was entered on the minutes or records of the corporation, appointing the plaintiff clerk of the church. The court held such vote unnecessary to be shown, and that there was sufficient evidence of an implied promise of the corporation to make the compensation. In the King *v.* Inhabitants of Chipping Norton, 5 East, 239, there was a demise by a verbal agreement of the corporation, at a court leet, of certain tolls belonging to the corporation. The court held, that the corporation could demise only under seal, and that the agreement amounted to a mere license to collect the tolls, though it might be a ground to apply to a court of equity to enforce it as an equitable interest. The ground there was not that the proceeding being verbal was a nullity, but that it did not operate as a demise of the tenement at law. It was conceded that the verbal agreement bound the corporation as a license.

But the present question does not depend upon the point, whether the acts of a corporation may be proved otherwise than by some written document. The reasoning upon it, however, was very ably gone into at the bar, and as it furnishes very strong illustrations upon the point now in judgment, it could not be passed over with propriety.

In the present case, the acts of the corporation itself, done at a corporate meeting, are not in controversy. In corporations existing at the common law and by charter, there are great diversities both of powers and organization. In some corporations the whole powers rest in a select body, or in select bodies, with powers [*76] to perpetuate their own *corporate existence, by filling up vacancies in their own body; and such body or bodies con-

stitute the corporation itself, and the meetings and acts done thereat are the meetings and acts of the corporation itself. In short, they constitute the corporation, so far as it has life or organization exclusively. Such are many of the boroughs and other municipal corporations in England, familiarly shown by the name of *quasi* corporations. There are corporations of another sort, where the aggregate body of corporators meet and assemble to discharge corporate functions, and have authority also to perform certain acts and duties, by means of different agents, sometimes designated in the statutes creating them, and sometimes left to their own choice. Of this nature are the townships in New England, where the inhabitants are corporators, and assemble to exercise corporate powers, and have authority to appoint various officers to perform public duties, under the guidance and direction of the corporation. Such are the selectmen for the ordinary municipal concerns; overseers of the poor, school committees, assessors of taxes, and various other functionaries. In these cases, the various officers form different boards for the performance of different duties, subordinate to the corporation; their acts lawfully done, bind the corporation; but they do not constitute the corporation, nor are their meetings the meetings of the corporation. In the latter cases, the records of the officers are properly records of their own proceedings, and not of the proceedings of the corporation itself.

It will be at once seen, upon an inspection of the charter creating the Bank of the United States, that it is not a corporation of the former description. The charter, in the 1st section, declares that a bank of the United States of America shall be established, with a capital of $35,000,000, of which $7,000,000 shall be subscribed by the United States, and the residue by individuals and corporations. It proceeds to enact, in the 7th section, that the subscribers to the said Bank of the United States, their successors and assigns, shall be and hereby are created a corporation and body politic, by the name and style of "The President, Directors, and Company of the Bank of the United States," and by that name shall be capable in law to have, *purchase, receive, &c., lands, &c., goods, chattels, [*77] and effects, &c., to an amount not exceeding $55,000,000, including their capital stock; and the same to sell, grant, &c.; to sue, and be sued, &c.; to make, have, and use a common seal, and to alter the same at pleasure; to ordain, and establish, and put in execution such by-laws and ordinances as they shall deem necessary and convenient for the government of the said corporation; and generally to do and execute all and singular the acts, matters, and things which to them it shall or may appertain to do, subject to the other provisions of the act. It proceeds to enact that, for the manage-

ment of the affairs of the corporation, there shall annually be chosen twenty-five directors, by the stockholders; and the board of directors shall appoint a president of the corporation. The directors have further authority given to them to appoint such officers, clerks, and servants, as they shall deem necessary for executing the business of the corporation, and to exercise such other powers and authorities for the well-governing and ordering of the officers of the corporation, as shall be prescribed by the laws, regulations, and ordinances of the same. The directors have further authority given them to establish offices of discount and deposit, wheresoever they shall think fit, within the United States or the territories thereof, and to commit the management of the said offices, and of the business thereof respectively, to such persons and under such regulations as they shall deem proper, not being contrary to law or the constitution of the bank; and annually to choose the directors of such offices. Among the rules, which the act prescribes as fundamental articles of the constitution of the corporation, are the following: "That not less than seven directors shall constitute a board for the transaction of business, of whom the president shall always be one, except in case of sickness or necessary absence;" that sixty stockholders, who are proprietors of 1,000 shares in the stock, "shall have power at any time to call a general meeting of the stockholders, for purposes relative to the institution;" "that each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond, with two or more sureties, to the satisfaction of the directors, in a sum [*78] not less *than $50,000, with condition for his good behavior, and the faithful performance of his duties to the corporation;" that the total amount of the debts of the corporation shall not exceed a limited sum; and if it does, the directors shall, in their natural and private capacities, be liable to any creditor therefor, with the exception that any director who shall have been absent when the excess was contracted or created, and who shall have dissented from the resolution or act authorizing it, and shall give notice of the fact in a particular manner, shall be exonerated; that the secretary of the treasury shall be furnished, from time to time, as often as he may require, &c., with statements of the amount of the capital stock, of debts due, of moneys deposited, of notes in circulation, and of specie on hand; and shall have a right to inspect such general accounts of the bank as shall relate to the said statement. The act further provides, that a committee of either house of congress, appointed for that purpose, shall have a right to inspect the books, and to examine into the proceedings of the corporation, and to report whether the provisions of the charter have been violated or not.

Such is a summary of the most important provisions of the act constituting the charter of the bank, and material to the present cause. It is most manifest that the corporation is altogether a distinct body from the directors, possessing all the general powers and attributes of an aggregate corporation, and entitled to direct and superintend the management of its own property, and the government of the institution, and to enact by-laws for this purpose. So far as the act delegates authority to the directors, the latter possess it, and may exercise it, not as constituting the corporation itself, but as its express statute agents to act in the ordinary business of the institution. The directors are created a board, and not a corporate body. If the authority delegated to them can only be exercised by them when assembled as a board, with a proper quorum, and not by the separate assent of a majority of the whole body, (on which it is unnecessary here to express any opinion,) still, it is clear that their meetings and acts are but the meetings and acts of a board of agents acting *ex officio*, and not the meetings and * acts of the corpo- [*79] ration itself. The whole structure of the charter, and the whole proceedings under it, as well as the by-laws and regulations which have come under our review, demonstrate that this has been the uniform construction of the corporation itself, and of the directors. Indeed, this is believed to be so universally acted upon in all the cases respecting banks, which have been judicially decided, that it is not thought necessary to do more than express our opinion that such is the true interpretation of this charter.

It is not necessary to consider whether the sixth of the fundamental articles of the constitution of the bank, which directs that such cashier or treasurer shall be required to give bond, &c., to the satisfaction of the directors, might have applied, by its own force, to the cashiers of offices established as offices of discount and deposit. In the first place, that point is not put in the pleadings; in the next place, the directors are, by the charter, authorized to establish such offices, subject to such regulations as they shall deem proper; and, in virtue of that authority, they have prescribed regulations on this very subject, in the 30th article of the rules and regulations adopted by them for the government of such offices, which are set forth at large in the transcript of the record. The fourth of these articles declares that the directors of the Bank of the United States shall appoint the cashiers of the offices of discount and deposit; the fifth declares the duties of the cashier, and, among other things, his duty "to attend all meetings of the board" of directors of the office, and "to keep a fair and regular record of its proceedings." The sixteenth directs that all notes and bills discounted shall be entered in a book,

to be called the credit book, in such manner as to discover to the board at one view, on each discount day, the amount which any person is discounter, or is indebted to the office, either as payer or indorser. The thirteenth directs that "the cashier of each office shall give bond to the president, directors, and company of the Bank of the United States, with two or more approved securities, with a condition for his good behaviour and faithful performance of his duties to the corporation." By whom the approval is to be made, whether by the directors of the parent bank, or by the [*80] directors *of the office, is not stated. If the directors of the parent bank might, by the charter, have committed it to the local directors, being found in a system of by-laws for their regulation, it would seem a natural inference that it was their intention to commit it to the latter. When, as in the fourth rule, they reserve the appointment of the cashier to themselves, the language directly reserves it to "the directors of the Bank of the United States." If such authority could not, by the charter, be delegated, then it must be deemed to belong to the directors of the parent bank. It is in the latter point of view that it has been argued at the bar, and in that view it will be considered by this court.

Assuming, then, that the directors of the parent bank were, as a board, to approve of the bond, so far as it respects the securities, in what manner is that approval to be evidenced? Without question the directors keep a record of their proceedings as a board; and it appears by the rules and regulations of the parent bank read at the bar, that the cashier is bound "to attend all meetings of the board, and to keep a fair and regular record of its proceedings." If he does not keep such a record, are all such proceedings void, or is the bank at liberty to establish them by secondary evidence? In the present case, (we repeat it,) the whole argument has proceeded upon the ground as conceded, that no such record exists of the approval of the present bond.

The charter of the bank does not, in terms, require that such an approval shall be by writing, or entered of record. It does not, in terms, require that the proceedings of the directors shall generally be recorded, much less that all of them shall be recorded. It seems to have left these matters to the general discretion of the corporation, and of the directors; and though it obviously contemplates that there will be books kept by the corporation which will disclose the general state of its affairs, it is not a just inference that it meant that every official act of the directors should be recorded, of whatever nature it might be. And if it had, it would deserve consideration, whether such provisions ought to be deemed conditions precedent,

without which the act was void, or only directory to the officers in the performance of their duty, the omission of which might subject * themselves to responsibility, and the corporation [*81] itself to the imputation of a violation of its charter. There are many cases where an act is prescribed by law to be done, and record made thereof, and, nevertheless, if left unrecorded, the act is valid. By the English Marriage Act, registers of marriages are required to be kept in public books, in every parish, and signed by the parties and the minister, and attested by two witnesses. Yet it has been decided that such an entry is not necessary to the validity of the marriage, and that an erroneous entry will not vitiate it; 1 Phillips's Evid. c. 5, s. 2, [326.] So, where a magistrate omits to record an oath of office taken before him, parol evidence of the fact is admissible, though it is an omission of duty; Bassett *v.* Marshall, 9 Mass. 312. That some of the provisions of the charter and by-laws may well be deemed directory to the officers, and not conditions without which their acts would be utterly void, will scarcely be disputed. What are to be deemed such provisions must depend upon the sound construction of the nature and object of each regulation, and of public convenience, and apparent legislative intention. If a regulation be merely directory, then any deviation from it, though it may subject the officers to responsibility, both to the government and the stockholders, cannot be taken advantage of by third persons. United States *v.* Kirkpatrick, 9 W. 720; United States *v.* Van Zandt, 11 W. 184. In the case of The Bank of the Northern Liberties *v.* Cresson, 12 Serg. & Rawle, 306, the directors were required, by their own by-laws, to take a bond of the bookkeeper, with sureties, and they took a bond from sureties without joining the principal. The court held the bond valid, notwithstanding the by-law, and took notice of the distinction between such provisions of a statute as are essential to the validity of an act, and such as are merely directory. Mr. Justice Duncan said that it was a matter between the directors and the stockholders, and that the obligors, who had voluntarily entered into the stipulation, could not withdraw themselves from their obligation.

* But waiving, for the present, this inquiry, we ask, upon [*82] what ground it can be maintained that the approval of the bond by the directors must be in writing. It is not required by the terms of the charter or the by-laws. In each of them the language points to the fact of approval, and not to the evidence by which it is to be established, if controverted. It is nowhere said the approval shall be in writing or of record. The argument at the bar, upon the necessity of its being in writing, must, therefore, depend for its sup-

port upon the ground that is a just inference of law from the nature and objects of the statute, from the analogy of the board of directors to a corporate body, from principles of public convenience and necessity, or from the language of authorities which ought not to be departed from.

Upon the best consideration we can give the subject, we do not think that the argument can be maintained under any of these aspects.

If the directors had been a board constituted by an unincorporated company, or by a single person, for the like purposes, and with the like powers, it would scarcely occur to any person that the acts of the board must, of necessity, be reduced to writing, before they would bind their principal. The agents of private persons are not usually in the habit of keeping regular minutes of all their joint proceedings, and hitherto there has been no adjudication which requires such a verification of their joint acts. Yet innumerable cases must have arisen in which such a principle might have been applied with success, if it had ever been supposed to possess a legal existence. The acts of private and public trustees, of joint agents for commercial purposes, of commissioners for private objects and of public boards, must have presented many occasions for passing upon such a doctrine. The silence of the books, under such circumstances, would form no inconsiderable answer to the argument, connected, as it must be, with the knowledge of the loose and inartificial manner in which much of the business of agencies is generally conducted. There may be, and undoubtedly there is, some convenience in the preservation of minutes of proceedings by agents; but their subsequent acts are often just as irresistible proof of the existence of prior

[*83] *dependent acts and votes, as if minutes were produced.

If a board of directors were created to erect a bridge, or make a canal or turnpike, and they proceeded to do the service, and under their superintendence there were persons employed who executed the work, and the board proceeded to pay them therefor out of funds in their hands, these facts of public notoriety would be as irresistible evidence of the due execution of their authority, and of due contracts made, and proceedings had by the board, as if the proceedings were recorded in the most formal and regular manner. Can there be a doubt that, in the cases put, many contracts are so varied and rescinded, many acts done and assented to by the board, which never are reduced to formal votes, and declarations, and written proofs? We think we may safely say that the sense of the profession, and the course of private business, have never, hitherto, in respect to private agencies and boards, recognized the existence of

any rule which required their acts and proceedings to be justified by written votes.

What foundation is there for a different rule in relation to agencies for corporations? The acts of a single duly authorized agent of a corporation, within the scope of his authority, bind the corporation, although he keeps no minutes of such acts. They may be, and they are, daily proved *aliunde*. In what respects do the acts of a board of agents differ from those of a single agent, in their operation as evidence? A board may accept a contract, or approve a security by vote, or by a tacit and implied assent. The vote or assent may be more difficult of proof by parol evidence, than if it were reduced to writing. But, surely, this is not a sufficient reason for declaring that the vote or assent is inoperative. If a board of directors agree to build a banking-house, and it is accordingly built, and paid for by their cashier, with their assent, is the whole proceeding to be deemed void, because, in the progress of the undertaking, from accident or negligence, the votes and the payments have not been verified by regular minutes? But it is said that, in the present case, the cashier is required to keep a fair and regular record of the proceedings of the directors. But if this is admitted, it does not establish the purpose for *which it is used. It is a by-law of the corpo- [*84] ration, directory to its officers, enacted for its own security and benefit, and not for the purpose of restricting the acts of the directors. If the cashier should neglect to keep such records, or should omit any single vote, the by-law has not declared that the vote shall be void and the proceedings nugatory. Suppose no such by-law had been passed, would not the votes of the board have bound the corporation? If they had discounted notes, taken mortgages, advanced money, and bought stock, by faith of *viva voce* unrecorded votes, and evidence of the existence of these acts and votes necessarily resulted from the other proceedings of the bank, could it be the intention of the legislature that they should be utterly void? or of the stockholders, that any by-law should operate a legal extinguishment of their title to the property? It seems to us difficult to imagine that such could be the legislative or corporate intention. If, in ordinary cases, such an intention could not be inferred in order to produce a very strict and inconvenient construction of the charter, there is still less reason to apply it to the cases of approval of official bonds. These are taken exclusively for the security and benefit of the bank itself, and not of mere strangers. The approval is matter of discretion in the directors, and that discretion once being exercised, it is of very little consequence to the bank whether a written minute of the vote be made or not. All that the bank is interested in is, that

there shall be an approval; and it matters not whether the fact is established by a direct record, or by acts of the directors, which recognize its prior existence.

It has been supposed by the defendant's counsel, that the case of Beatty *v.* The Marine Insurance Company, 2 Johns. 109, is in point in his favor. Upon an examination of the facts of that case, we think it is otherwise. In that case, the incorporating act provided that no losses should be paid without the approbation of at least four of the directors, with the president and his assistants, or a majority of them. The attempt was to charge the company with a total loss, upon a verbal agreement made by the president and assistants, to accept an abandonment, and pay a total loss, at a meeting, when it did not appear that a single *director was present. The board therefore was not so constituted as to bind the company. Mr. Justice Thompson, in delivering the opinion of the court, said: "No part of the case will warrant an inference that any of the directors were present at the time of the alleged acceptance. When the plaintiff's agent called to know the determination of the company in relation to the payment of the loss, he says, the secretary went into the room where the president and assistants were convened, and the answer returned was, that the president and assistants had agreed to pay a total loss; but no mention is made of any of the directors being present, or assenting to it. When the testimony is positive, as to the persons by whom the acceptance is made, there is no room left for presumption. If any of the directors were present, so as to make the act binding on the company, the plaintiff ought to have shown it affirmatively. We are of opinion, therefore, that the acceptance, not having been made by the agents constituted by the act of incorporation, cannot be binding on the company." The case, therefore, so far as it goes, is against the defendants. It carries an almost irresistible inference, that the court did not think a written vote of acceptance necessary, and that parol proof would have been sufficient. No other authority has been produced to sustain the argument; and it cannot be doubted that if any did exist, the researches of the counsel would have brought it before the court. We may therefore consider that it is a new doctrine, unsupported by prior cases, and to be established now for the first time. We think that the reasons of public convenience and individual safety and protection, would not be promoted by establishing it.

[*85]

On the other hand, every case which has been adduced to show that corporate acts need not always be reduced to writing, but may be proved by presumptions, is, *à fortiori*, an authority against the argument. There are, however, some cases which confirm, in a very

clear manner, the doctrine for which we contend, and which have not been yet particularly adverted to. In the case of Apthorp, Treasurer of the Commonwealth, *v.* North, 14 Mass. 167, a suit was brought on the official bond of a coroner. By the laws of Massachusetts, the bond was required to be approved by *the court [*86] of common pleas of the county. It was delivered into the court of common pleas by the first justice thereof, and remained on its files for some time. No record was ever made of its approval by the court of common pleas; and, at the trial, contradictory evidence was offered, of a presumptive nature, as to its approval and rejection by that court. It was held, that notwithstanding there was no record of any approval, the bond might well, upon the circumstances, be deemed to have been duly delivered and approved. Chief Justice Parker, in delivering the opinion of the court, said: "A formal act, or certificate of approbation by the court, is not made necessary by the statute;" and after commenting on the terms of the statute, he added, "it is not, then, required expressly that any record or certificate should be made, that the bond given was approved. But if such bond is found upon the files, without any evidence accompanying it that it has been rejected, and the principal has proceeded to execute the duties of his office, the presumption is violent, if not conclusive, that the bond was received by the court as the security required by the statute." In Foster *v.* The Essex Bank, 17 Mass. 479, there was no clause in the charter respecting the receipt of special deposits, and no by-law had ever been made by the corporation or the directors on the subject. But the practice had long prevailed to receive such deposits, and was known to the directors, though no vote could be found recognizing them. The court held the bank liable for the safe-keeping of such deposits, like a common bailee, without hire, upon the ground that there was a plain adoption of them, from the knowledge and acquiescence of the directors. The case of The Dedham Bank *v.* Chickering, 3 Pick. 335, approaches still nearer the present case, and discussed the very point now in judgment. It was the case of an official bond, given by the cashier of the bank, with sureties. The charter required that the cashier, before he entered upon the duties of his office, should give bond, with two sureties, to the satisfaction of the directors. After the cashier was elected, the directors passed a vote, that A B and C D be accepted as sureties in a bond to be given by the cashier for the faithful discharge of the duties of his *office. The bond in question was dated before this [*87] vote; but does not seem to have had but one surety. That circumstance, however, was not relied on at the argument; but the principal ground was, that there had been no approval of the bond

by the board of directors. It was found on their files, and the cashier had been frequently reëlected. Chief Justice Parker, in delivering the judgment of the court, said: "We should have supposed that in the case as well of a corporation as of an individual, a paper intended for their benefit, and found on their files, would be considered as accepted by them;" and after alluding to the decision of the circuit court in this case, which required the record of a vote of the directors, he added: "We think, however, that the case before us may be decided without touching that principle; for, admitting it to be correct, we are, nevertheless, of opinion, that the vote to accept the sureties, and the bond being in possession of the President, are a sufficient acceptance of the bond." It is impossible, we think, to doubt that the real opinion of the court was, that the acceptance might be proved without any record of a vote, and that the very facts of the case brought the point of implied and presumptive acceptance from other acts of the directors completely in judgment.

So far, then, as authorities entitled to very great respect and deference go, we are of opinion that they are against the reasoning assumed on behalf of the defendants.

To all the authorities cited at the bar on this point, the counsel for the defendants has made one answer, which he deems applicable to all of them. It is this: that where no particular form for the expression of the corporate will is prescribed by law, there it may be inferred from corporate acts; but that where such a form is prescribed, it must be followed. This distinction, he supposes, will reconcile all the cases. The distinction, if admitted, will not aid the argument. It may be, and, indeed, is conceded, that no corporate act can be valid, if done differently from the manner prescribed by law as essential to its validity. If in the present case the statute had prescribed that nothing but a written vote on record should be deemed an approval of the bond, or that the cashier should not be [*88] deemed, for any purpose, in *office, until such approval, the consequence contended for would have followed. His acts would have been utterly void, and any unrecorded vote of approval nugatory. But the very point in controversy is, whether such written record be necessary by the charter or by-laws, not as a matter of convenience or discreet exercise of authority, but as a *sine qua non* to the validity of the act. The cases which have been commented on by the court do not deny the distinction, but proceed upon the ground that, unless positively required by law, a written vote is not to be deemed indispensable. The court, then, is called upon, not to administer a doctrine of strict, and settled, and technical law, but to introduce a new rule into the law of evidence; and to exclude pre-

sumptive evidence, not only of the acts of corporations, but of their unincorporated agents. If such a rule be fit to be adopted, it must be upon the foundation of some clear and unequivocal analogy of law, and public policy and convenience. We are not prepared to admit that it has any such foundation. On the contrary, we are persuaded that the introduction of the rule itself would be attended with serious public mischiefs, and shake many titles and rights which have been consummated in entire good faith, and the confidence that no such written record was necessary to their validity. We cannot, therefore, assent to the doctrine decided in the circuit court on this point.

In respect to a collateral argument urged at the bar, upon the point whether the terms of the charter and by-laws would be complied with, without an express vote that the bond was "to the satisfaction of the directors," or that the sureties of the bond were "approved" by the directors, we are of opinion that, in either case, there need not be express votes of approval and satisfaction. An acceptance of the bond, by the directors, would necessarily, in intendment of law, include the approval of it, and be conclusive of it.

The remaining point is as to the opinion of the court delivered in the first bill of exceptions. If that opinion meant to state what it seems to import, that the cashier was not legally cashier, so as to bind the bank in its rights and interests by his acts, if permitted to enter upon the duties of his office before a satisfactory bond was given, we think it cannot * be maintained. The cashier [* 89] was duly appointed, and he was permitted to act in his office, under the express sanction of the directors, for several years. If he had never given any bond whatsoever during this period, yet, his acts within the scope of his authority would have bound the bank. Notes signed by him would be lawful notes; moneys paid by him would be irrecoverable; records kept by him would be bank records. Indeed, it is conceded by the defendant's counsel, that the bank would, under such circumstances, be bound by his acts in favor of third persons, acting upon the faith of his public character. The same principle, in our opinion, applies in favor, as against the bank. If he could legally perform the duties of the office for any purposes, he could for all. He was either an agent, capable of binding the bank in all his official acts, or those acts were void as to third persons, as well as the bank. If he was held out as an authorized cashier, that character was equally applicable to all who dealt with the bank, in transactions beneficial, as well as onerous to the bank. It seems to us that the charter and the by-laws must be considered in this respect as directory to the board, and not as conditions pre-

cedent. The language is not more strong than that of the laws which came under the consideration of this court, in the United States *v.* Kirkpatrick, 9 W. 720, and the United States *v.* Van Zandt, 11 W. 184.

Our view of this matter is in exact coincidence with that entertained by the supreme court of Pennsylvania, in the Bank of the Northern Liberties *v.* Cresson, 12 Serg. & Rawle, 306. The directors might have been responsible for their neglect of duty; but it was a matter wholly between themselves and the stockholders, and between the latter and the government, as a violation of the charter and by-laws.

So far, indeed, as respects the sureties to the bond, they may not be responsible for any breaches of official duty by the cashier, before their obligation has been accepted. But this is a very different consideration from that which respects the legal effects of the acts of the cashier himself, upon the interests and transactions of the bank itself.

[*90] *This is the substance of what we deem it necessary to say upon the present occasion. We do not go into the consideration of the admissibility of every part of the documents and testimony offered in evidence. Perhaps some of them were in a shape not exactly fit to be admitted as formal evidence, without further verification and proofs. But, much of it was of a nature unexceptionable, as conducing to proof of the issues joined, if any thing short of record proof were admissible, as competent to establish the approval or acceptance of the bond. It is not understood that the circuit court entertained any doubt as to its general competency, except upon the ground already stated. We are of opinion that the evidence was competent, in point of law, to go to the jury, notwithstanding there was no record of approval of the bond, it being in its nature competent; its sufficiency to establish the issues was matter of fact, the decision of which belonged to the jury, and upon which they ought to have been allowed to pass their verdict.

The judgment of the circuit court must be reversed, and a mandate awarded, with directions to the circuit court to award a *venire facias de novo.*

MARSHALL, C. J., dissented. I should now, as is my custom, when I have the misfortune to differ from this court, acquiesce silently in its opinion, did I not believe that the judgment of the circuit court of Virginia gave general surprise to the profession, and was generally condemned. A full conviction that the commission of even gross

error, after a deliberate exercise of the judgment, is more excusable than the rash and hasty decision of an important question, without due consideration, will, I trust, constitute some apology for the time I consume in stating the reasons and the imposing authorities which guided the circuit court in the judgment that has been reversed.

The case before that court depended on the question whether the official bond of the cashier, on which the suit was brought, bound the defendants.

As preliminary to the investigation of this question, I shall state some propositions belonging to it, which are supposed to be incontrovertible. All admit that delivery is essential to the validity of a deed, and that acceptance is essential to a complete delivery. If this be true, they must *be proved in every case [*91] where they are put in issue by the pleadings. This proof varies according to circumstances. If there be subscribing witnesses to the instrument, it can be proved only by them, if attainable. If unattainable, or if there be no subscribing witnesses, other proof may be admitted; but, in every case, a delivery and acceptance must be legally proved.

If, in transactions between individuals where a deed is without a subscribing witness, proof of the signature of the maker, accompanied with the facts that the instrument has passed out of his hands, and is in the possession of the person for whose benefit it was made, be *primâ facie* evidence of its delivery, it is because delivery by mere manual tradition, without witnesses, is good; and the assertion of title under it is proof of acceptance, because that requires only the assent of the mind, which assent is legally manifested by asserting a claim to it. That a plaintiff may maintain his action by this evidence, does not show that delivery and acceptance are unnecessary, or that proof of them can be dispensed with; but that, in ordinary cases, this evidence amounts to such proof. If, however, a case should occur in which the possession of the instrument by the party claiming under it, does not afford legal *primâ facie* evidence of delivery and acceptance, because such party is incapable of receiving and assenting to the instrument in a form which can be legally proved or inferred from those facts, then such other facts must be shown on the trial as will establish a lawful delivery and acceptance.

I state these legal axioms at the hazard of being thought tedious, because they appear to me to have a direct bearing on the case before the court.

The plaintiff is a corporation aggregate; a being created by law itself impersonal, though composed of many individuals. These in

dividuals change at will; and, even while members of the corporation can, in virtue of such membership, perform no corporate act, but are responsible in their natural capacities, both while members of the corporation and after they cease to be so, for every thing they do, whether in the name of the corporation or otherwise. The corporation being one entire impersonal entity, distinct [* 92] * from the individuals who compose it, must be endowed with a mode of action peculiar to itself, which will always distinguish its transactions from those of its members. This faculty must be exercised according to its own nature.

Can such a being speak, or act otherwise than in writing? Being destitute of the natural organs of man, being distinct from all its members, can it communicate its resolutions or declare its will, without the aid of some adequate substitute for those organs? If the answer to this question must be in the negative, what is that substitute? I can imagine no other than writing. The will to be announced is the aggregate will. The voice which utters it must be the aggregate voice. Human organs belong only to individuals. The words they utter are the words of individuals. These individuals must speak collectively to speak corporately, and must use a collective voice. They have no such voice, and must communicate this collective will in some other mode. That other mode, as it seems to me, must be by writing.

A corporation will generally act by its agents; but those agents have no self-existing power. It must be created by law, or communicated by the body itself. This can be done only by writing.

If, then, corporations were novelties, and we were required now to devise the means by which they should transact their affairs, or communicate their will, we should, I think, from a consideration of their nature, of their capacities and disabilities, be compelled to say, that where other means were not provided by statute, such will must be expressed in writing.

But they are not novelties. They are institutions of very ancient date; and the books abound with cases in which their character and their means of action have been thoroughly investigated. In Brooke's Abridgment, (title Corporation,) we find many cases, cited chiefly from the Year Books, from which the general principle is to be extracted, that a corporation aggregate can neither give nor receive, nor do any thing of importance, without deed. Lord Coke, in his commentary on Littleton, (66 b.) says: "But no corporation [* 93] aggregate of many persons capable" * "can do homage." "And the reason is, because homage must be done in person, and a corporation aggregate of many cannot appear in person;

for, albeit, the bodies natural, whereupon the body politic consists, may be seen, yet the body politic or corporate, itself, cannot be seen, nor do any act, but by attorney." So, too, a corporation is incapable of attorning otherwise than by deed, (6 Co. 386,) or of surrendering a lease for years, (10 Co. 676,) or of presenting a clerk to a living, (Br. Corp. 83,) or of appointing a person to seize forfeited goods, (1 Vent. 47,) or agreeing to a disseisin to their use, (Br. Corp. 34.) These incapacities are founded on the impersonal character of a corporation aggregate, and the principle must be equally applicable to every act of a personal nature.

Sir William Blackstone, in his Commentaries, (v. 1, p. 475,) enumerates, among the incidents to a corporation, the right "to have a common seal." "For," he adds, "a corporation being an invisible body, cannot manifest its intention by any personal act or oral discourse. It therefore acts and speaks only by a common seal. For though the particular members may express their private consents to any acts, by words, or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole."

Though this general principle, that the assent of a corporation can appear only by its seal, has been in part overruled, yet it has been overruled so far only as respects the seal. The corporate character remains what Blackstone states it to be. The reasons he assigns for requiring their seal as the evidence of their acts, are drawn from the nature of corporations, and must always exist. If the seal may be exchanged for something else, that something must yet be of the same character, must be equally capable of "uniting the several assents of the individuals who compose the community, and of making one joint assent of the whole." The declaration that a seal is indispensable, is equally a declaration of the necessity of writing; for the sole purpose of a seal is to give full faith and credit to the writing to which it is appended. The seal in itself, not affixed *to an instrument of writing, is nothing; is meant [*94] as nothing, and can operate nothing. The writing is the substance, and the seal appropriates it to the corporation.

Though the rule stated by Blackstone may not be so universal as his language indicates, it is certainly of extensive application, and the exceptions prove its extent. Mr. Hargrave, in his notes on Co. Litt. 99, says: "In general, a corporation aggregate cannot take or pass away any interest in lands, or do any act of importance, without deed, but there are several exceptions to the rule." The question before the court depends very much on the extent of these

exceptions, and on the manner in which this invisible impersonal being must act and speak, when it may act and speak without using its seal.

It is stated in the old books, (Br. Corp. 49,) that a corporation may have a ploughman, butler, cook, &c., without retaining them by deed; and in the same book, (50,) Wood says: "Small things need not be in writing, as to light a candle, make a fire, and turn cattle off the land." Fairfax said: "A corporation cannot have a servant but by deed. Small things are admissible on account of custom, and the trouble of a deed in such cases, not by strict law." Some subsequent cases show that officers may be appointed without deed, but not that they may be appointed without writing. Every instrument under seal was designated as a deed, and all writings not under seal were considered as acts by parol. Consequently, when the old books say a thing may be done without deed, or by parol, nothing more is intended than that it may be done without a sealed instrument. It may still require to be in writing. In 2 Bac. Abr. 13, it is said: "Aggregate corporations, consisting of a constant succession of various persons, can regularly do no act without writing; therefore, gifts by and to them must be by deed." In page 340, it is said: "If a corporation aggregate disseise to the use of another, they are disseisors in their natural capacity;" "as a corporation they can regularly do no act without writing."

In the case of The King *v.* Bigg, 1 Str. 18, the prisoner was convicted for erasing an indorsement on a bank-note. The
[* 95] indictment and verdict are set forth at large by * Peere Williams, (v. 3, p. 419,) and it appears that the note was signed by Joshua Adams, who was intrusted and employed by the Bank of England to sign bank-notes, but not under their common seal. It was contended by Peere Williams, in an able argument, that the appointment was not valid, because not made under their common seal; and his argument contains an enumeration of decisions previously made, which go far in support of his proposition. The prisoner, however, was condemned, and, consequently, the appointment was held valid. But there is no reason to suppose that it was not made by writing. The verdict finds "that he was intrusted and employed by the governor and company of the Bank of England, but not under their common seal." Consequently, his employment was evidenced by writing, if it was necessary; and the negative finding that it was not under their common seal, strengthens the presumption that it was in writing. Peere Williams has reported his argument, and would certainly have taken this objection had the case afforded it. I consider the appointment of Adams, then, as having been made in writing, though not under seal.

Mr. Fonblanque says, vol. 1, p. 296, note *o*: "And the agreement of the major part of the corporation, being entered in the corporation books, though not under the corporate seal, will be decreed in equity." The inference is strong, that it will not be decreed unless it be entered on the corporation books. Consequently, unless it be so entered, it is not an agreement; for every lawful agreement, which is in itself equitable, will be decreed in equity."

In the Mayor of Thetford's case, 1 Salk. 192, Lord Holt said, that though a corporation cannot do an act *in pais* without their common seal, they may do an act on record, and that is the case with the city of London, which makes an attorney in court annually by warrant; and the reason is, they are estopped by the record. Upon the same principle, a return to a *mandamus* is good, though not under the common seal. In these exceptions to the general rule, the substitute for the common seal must be writing; and the exceptions are stated in terms which exclude every idea that the act can be evidenced otherwise.

*Yarborough *v.* The Bank of England, 16 East, 6, was [* 96] an action of trover and conversion, in which, after verdict for the plaintiff, it was moved, in arrest of judgment, that the action would not lie, because a corporation was incapable of committing a tort. The action was sustained; and Lord Ellenborough, in delivering the opinion of the court, said that a corporation can act only through the instrumentality of others; and, wherever they can act or order any act to be done on their behalf, which, as by their common seal they may do, they are liable to the consequences of such acts. "A corporation cannot be aiding to a trespass, nor give a warrant for a trespass, without writing." His lordship cited several old cases, showing the incompetency of a corporation to act in important matters otherwise than by deed; and added: "But many little things require no special command; as to chase cattle out of their land. Those things are incident to the appointment." Several cases are put in which a corporation may be liable for a trespass; but they are all consistent with his first proposition, that the liability of a corporation must be founded on writing. "If," he says, "the mayor and commonalty disseise me, and I release to twenty or two hundred of the commonalty, this will not save the corporation; and the reason is, because the disseisin is in their corporate character, and the release to individuals." So, in trespass against the mayor and commonalty of York, they cannot justify under a right of the inhabitants to common, because the right in natural persons gave no right to a corporation. Nor could the corporation give a warrant, without writing, to commit a trespass. The foundation of this action is, was

the authority, in writing, given by the corporation? It stands on the same principle with the action of *assumpsit*, made by an agent acting under a written power. The idea that their seal was indispensable to the validity of all corporate acts, which is laid down in such strong terms by Blackstone and by others on whom he relied, probably grew out of the state of the times in which it originated; seals were then more frequent and better known than signatures. An instrument was much more certainly authenticated by the seal than by the name of the maker. This circumstance would bring [* 97] seals into common use; and as *every corporation possessed a seal of extensive notoriety, and any other mode of authenticating its acts would, in those simple times, be attended with difficulties and perplexities, it is not matter of surprise that this rule should prevail. As writing has become more common, and seals are less distinguishable from each other, the good sense of mankind gradually receives the writing without the seal, in all the less formal and less important transactions of the corporate body. All the reasons derived from the corporate character, which have been assigned for requiring the seal, are satisfied by the writing without it.

The English cases on this subject are very well summed up by Mr. Kyd, p. 259. The result of the whole appears to be, that in England the general rule is that a corporation acts and speaks by its common seal, at least so far as respects the appointment of officers, whose duties and powers are important. In those transactions where the use of the seal would be unnecessary and extremely inconvenient, it is frequently dispensed with; but in all of them, I think, writing is indispensable. In almost every case which I can imagine, there ought to be and is a record in the corporation books. With respect to the necessity of a seal, the difference is certainly great between ancient and modern times; and between corporations whose principal transactions respected land, and those which are commercial in their character. This distinction may and ought to influence the use of the seal, but not the use of writing. The inability of a corporation aggregate to speak or act otherwise than by writing, is constitutional, and must be immutable, unless it be endowed by the legislature with other qualities than belong to the corporate character. The English cases, so far as I have had an opportunity of examining them, concur in the principle that a corporation aggregate can act only by writing. A case from 4 Barnw. & Cressw. has been cited at the bar, and undoubtedly deserves attention. I regret that it has not been in my power to examine it. As far, however, as I could judge of it from the statement made at

the bar, I did not think that it had overturned what appears to me to be the settled law of England.

*I will now inquire whether the decisions of this court [* 98] vary in principle from those of England.

Head and Amory *v.* The Providence Insurance Company, 2 C. 127, was an action on a policy of insurance, which the defendants contended had been vacated by a subsequent agreement; and the validity of this agreement constituted the sole question in the cause.

The plaintiffs had proposed terms for vacating the policy, and some communications had taken place through Brown and Ives, their correspondents, which showed a misunderstanding between the parties, and that mutual propositions had been mistaken by the plaintiffs for an acceptance of the terms they had proposed. This produced a letter from the plaintiffs, of the 3d of September, 1800, which was understood by the defendants, and was considered by the court, as amounting to a renewal of propositions for vacating the policy. The secretary of the company delivered to Brown and Ives, on the 6th of September, the following note: —

"*September* 6, 1800.

"As there appears to have been a misunderstanding in the business, as it respects the first propositions of the company, the directors are willing to accede to Messrs. Head and Amory's proposition, viz: to settle the policy on the merchandise at twenty-five per cent., although it was their intention and expectation to have both policies included in the settlement. Messrs. Head and Amory will please to forward the policy, and have it annulled immediately. Premium due 12-15 September.

"You will please to govern yourself accordingly, and we will attend to your wishes."

This paper was in the handwriting of the secretary, but without signature.

Testimony was given, at the trial, to show the usage of the insurance companies, to consider an agreement to do an act as equivalent to the performance of the act.

This paper was forwarded by Brown and Ives, on the 9th of September, to the house of Head and Amory, in Boston, and its receipt was acknowledged by their clerks on the 12th, they being at the time absent. On the 17th of September, *the plain- [* 99] tiffs wrote to Brown and Ives, informing them that, previous to their seeing the letter of the 9th, intelligence was received of the capture of the vessel, which would, of course, prevent any further negotiation on the subject.

The circuit court determined that the agreement to vacate the policy was complete; and the jury found for the defendants. The judgment was brought before this court, and was reversed; because this informal paper did not amount to an acceptance of the terms proposed by the plaintiffs. The act incorporating the company enacted: "That policies of insurance, and other instruments, made and signed by the president of the said company, or any other officer thereof, according to the ordinances, by-laws," &c., "shall be good and effectual," &c. The court considered the company as the mere creature of the incorporating act, and as being capable of exerting its faculties only in the manner which the act authorizes. This paper not being executed in the form prescribed by law, could not be considered as the act of the company.

On the testimony of the witness concerning usage, the court observed that: "If he was to be understood as stating that an assent to the formation or dissolution of a policy, if manifested according to the forms required by law, is as binding as the performance of the act agreed to be done, it is probable that the practice he alludes to is correct. But if he means to say that this assent may be manifested by parol, the practice cannot receive the sanction of this court. It would be to dispense with the formalities required by law for valuable purposes, and to enable these artificial bodies to act and to contract, in a manner essentially different from that prescribed for them by the legislature."

"An individual," the court added, "has an original capacity to contract and bind himself in such manner as he pleases." "He who acts by another, acts by himself. He who authorizes another to make a writing for him, makes it himself; but with these bodies, which have only a legal existence, it is otherwise. The act of incorporation is, to them, an enabling act. It gives them all the [* 100] power they possess. It *enables them to contract; and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."

The court considered the note of the 6th of September "as a mere informal paper, which might perhaps amount to notice of an act, if such act was really performed, but which is not in itself an act of any legal obligation on the company. That if the proposition contained in the letter of the 3d of September, had been regularly accepted, this note might possibly have been considered as notice of that acceptance, but is not in itself an acceptance."

I have gone the more fully into this case, because both the decision itself, and the reasoning by which it is supported, appear to me to apply throughout to the case now before the court.

This subject came on to be again considered in The Bank of Columbia *v.* Patterson's Administrators, 7 C. 299. That was an action of *assumpsit*, brought by Patterson's administrators, for work and labor done by their intestate for the bank. It was founded on an agreement, in writing, between Patterson and "a duly authorized committee of the directors of the bank," in their own names. Judgment was given in favor of the administrators, upon which the cause was brought, by a writ of error, into this court; and, among other objections to the proceedings below, it was contended that a corporation aggregate could not promise otherwise than under its seal.

In considering this objection, the court did not controvert the ancient rule. But this rule, if it ever existed to the extent claimed by the plaintiffs in error, had been relaxed; and it seems, at length, to have been established, that though corporations could not contract directly, except under their corporate seal, yet they might by mere vote or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation. It being conceded that the committee were authorized to make agreements, there could be no doubt that a contract made by them in the name of the corporation, would be *binding on the corporation. But as this promise is made in their own names, if the principle stopped here, the remedy would be only against the committee. [*101]

The court proceeds to consider it as a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation.

In applying this rule of law to the case then under consideration, the court reviewed the evidence from which the jury might legally infer, "that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted the engagement."

The Bank of Columbia *v.* Patterson's Administrators, differed from the case of the Providence Insurance Company *v.* Head and Amory, 2 C. 127, in two essential circumstances. The contract which was sustained against the bank was made through the instrumentality of a legally constituted agent; that which the insurance company attempted to set up purported to be a direct contract between the company and the plaintiffs in the cause. In the case of The Bank of Columbia, the court said: "At length, it seems to have been established that though they (corporations) could not contract directly,

except under their corporate seal, yet they might, by mere vote or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation."

The obligation on which this suit was instituted, if it be an obligation, purports to be a direct contract between the bank and the individuals who signed the instrument. It is not alleged that any agent was authorized to act for the bank.

Another very essential difference between the two cases cited from Cranch is this: In that of the Providence Insurance Company, the corporation attempted to set up an agreement, which, if it existed, was in its own possession. It claimed to imply that an act [* 102] had been performed by itself, *the evidence of which was in its own possession, and might be produced. The court disallowed this implication.

In the case of The Bank of Columbia, as in that of the insurance company, the act to be implied was an act performed by the corporation, in its own office, without witnesses, the evidence of which remained in its own possession; but it was set up against, not by the corporation. The court was not of opinion that the suit could be maintained without the existence of this act. No such idea is indicated. On the contrary, the language of the opinion shows very clearly that the act was necessary. If, in order to charge the bank, it was necessary that the corporation should have "adopted the contracts of the committee," and should have "voted to pay the whole sum which should become due under the contracts," the court enumerates circumstances which were deemed sufficient to justify a jury in implying against the corporation that the bank had performed these acts.

In the case at bar, the suit is brought by the corporation, and the corporation asks the court to imply that it has performed those acts which are necessary to the validity of the bond on which it sues, although the evidence of its having performed them is in its own possession.

Fleckner *v.* The Bank of the United States, 8 W. 338, was a writ of error to a judgment given by the court of the United States for the district of Louisiana, in favor of the bank, in a suit instituted against Fleckner, on a note given by him and indorsed to the Bank of the United States, by the president, directors, and company of the Planters' Bank of New Orleans, through their cashier, as their agent. One of the errors alleged in the proceedings of the court below was, that the cashier of the Planters' Bank had no authority to make the transfer. The authority was given by a vote of the board of direct-

ors to the president and cashier, and the act itself was afterwards affirmed by an instrument of writing under the corporate seal. It was contended that the original vote, empowering the president and cashier to perform the act, ought to have been a power under the corporate seal. In noticing this objection, *the [*103] court said: "Whatever may be the original correctness of this doctrine, as applied to corporations existing by the common law, in respect even to which it has been certainly broken in upon in modern times, it has no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special body or board of directors. And the acts of such body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts under the corporate seal."

The court then proceeded, in a very elaborate and well-digested opinion, to maintain that the indorsement was within the official duty of the cashier, that it was within the original power given to the president and cashier, and that, were this otherwise, it was sanctioned by the concluding act under the corporate seal. The whole of this case, as of the two preceding cases, turns upon the idea that a writing, in due form, on the part of the corporation, is indispensable to the validity of its contracts.

According to the decisions of the courts of England, then, and of this court, a corporation, unless it be in matters to which the maxim *de minimis non curat lex* applies, can act or speak, and, of course, contract, only by writing. This principle, which seems to be an essential ingredient of its very being, has been maintained by all the judges who have ever discussed the subject. Upon this principle, and the authority of these cases, I have supposed that a corporation cannot receive and assent to a deed of any description, unless this assent be expressed regularly in writing. It ought to be entered on the books of the corporation.

The counsel for the plaintiffs in error insist that the proof offered in the circuit court was sufficient to establish the full execution of the bond; and they support this proposition upon principle, upon convenience, upon usage, and upon the authority of cases decided in the different States of the Union.

It is, we are told, a general rule, that acceptance by a corporation is a fact which may be proved before a jury, and the acceptance of a new charter is mentioned to illustrate the rule.

*Without question, acceptance is a fact, and is to be [*104] proved before a jury; but the inquiry is, by what evidence may it be proved? I have supposed that it must be proved by testi-

mony which shows that the corporation has acted in the form in which alone it is capable of acting; that it has expressed its acceptance in the mode in which such a being is capable of expressing it. I receive readily the case put of the acceptance of a new charter, as an apt illustration of the principle we are investigating, and should be surprised, indeed, if a new charter were to be accepted without a vote of acceptance entered upon the record. The case cited from 1 Term Rep. 575, does not appear to me to sanction the doctrine it is adduced to support.

We are told, too, that there was never a time when a corporation might not take by a deed poll. But, if this be admitted, I cannot perceive its influence on the case. A deed poll is in writing, and there is the same necessity that its acceptance should be evidenced by writing as if it were an indenture. The general assertion, which we find in all the books, that a corporation can take only by deed, that is, as I understand it, that the act of taking must be by deed, applies as well to conveyances by deed poll, as by indenture.

We have been also referred to a time anterior to writing, and are asked how corporations then acquired property?

We have no knowledge of such a time. Since Europe was subdued and civilized by the arms and literature of Rome, the science of writing, though rare, has never been entirely lost. So much of it as remained was found most generally in corporate bodies. If the corporation was not entirely ecclesiastical, which in early times was most frequent, yet there can be little reason to doubt their having, among themselves, or being able to command, a scribe. Be this as it may, the earliest information we have on the subject tells us that corporations aggregate could only take or grant by deed, under their corporate seal. Even when land passed from man to man by livery, a corporation could not so grant or take. Livery could not be made by or to a corporation aggregate, because they are personal acts, and it is an impersonal being. These acts [*105] were to be performed *through the agency of an individual having a power to perform them under the corporate seal.

We are also told that the title of the bank to the ground purchased for a banking-house, and to all mortgages taken for the security of its debts, will be put in hazard by the principle which I have endeavored to maintain; that it is probable not a single conveyance will stand the test by which the defendant in error proposes to try its validity. And that the usage is, to receive and deposit them among the papers of the institution without taking any notice of them on its records.

I can scarcely suppose it possible that so loose a practice can have prevailed. I can scarcely suppose it possible that, on points of such vital importance, and of such rare occurrence, the plain requisites of law can have been so entirely disregarded. Deeds of mortgage, as well as of ground for necessary buildings, are conveyances of lands, and if any one legal proposition is laid down without a single exception it is this, that a corporation aggregate cannot take lands otherwise than by deed. To me it would appear very incautious to take such conveyances otherwise than as is prescribed in the books, that is, by appointing an attorney, under the corporate seal, to receive them; but, however this may be, I can scarcely suppose it possible that an act so easily performed as to enter their assent in their own books, should be habitually neglected. That the current business of the bank should sometimes want the requisite forms, might be excused, but that the same failure should take place in single transactions, which seldom take place, and are yet of great importance, seems to me to be scarcely possible. I should not be inclined to act judicially on the presumption that the fact exists. If it does, the mischief may be corrected by correcting the practice.

The counsel for the plaintiff rely very much on the cases which have been decided in the States of Pennsylvania, New York, and Massachusetts.

In the case mentioned at the bar, from Pennsylvania, a demurrer was filed to a plea in bar of the action on a cashier's bond, which brought up the very question in consideration before this court. The argument was opened by the * counsel for the [* 106] plaintiff, but he stopped in the midst of it, and withdrew his demurrer without submitting the point to the court.

The cases in New York have not, I think, gone further than The Bank of Columbia v. Patterson's Administrators, 7 C. 299. Those of Massachusetts have, I admit, gone the full length for which the plaintiffs contend, and the point is probably settled in that State. It would be presumptuous in me to place my understanding of those decisions in opposition to that of professional gentlemen from that State, but to me it seems that even there the doctrine has not been uniformly maintained. Bigelow's Digest of Massachusetts cases contains this passage: "Aggregate corporations cannot make a parol contract, unless by the intervention of some agent or attorney duly authorized by a corporate vote to contract on their part, because there is no other way in which they can express their assent." He cites 7 Mass. 102, in which Chief Justice Parsons said: "We cannot admit that a corporation can make a parol contract, unless by the intervention of some agent or attorney duly authorized to contract on their part."

In the Essex Turnpike Company *v.* Collins, 8 Mass. Rep. 292, the court said: "Aggregate corporations cannot contract without vote, because there is no other way in which they can express their assent."

In the case of Hayden *v.* The Middlesex Turnpike Corporation, 10 Mass. 397, the work for which the action was brought was performed on the road. The committee appointed to contract for, and superintend it, was frequently present while it was going on, and directed the workmen. Other directors were also present, and one of them swore that he supposed the work to be going on by order of the directors. But the contract was not in exact conformity with the written authority under which the committee acted. A verdict taken for the plaintiff, subject to the opinion of the court, was set aside, and the court said: "No individual member can represent the corporation in their aggregate capacity, but in consequence of their consent. The requisite evidence of this, at common law, was a deed under the seal of the corporation. Aggregate cor-
[*107] porations, *established by statute, are not restricted to that formality. They have power given them to order their affairs, and to appoint and employ agents, by votes or in such other manner as the corporation may by their by-laws appoint." Again: "Nor can a parol declaration, made to the corporators, at a corporate meeting, by any individual, amount to a contract between such individual and the corporation."

In The Proprietors of the Canal Bridge *v.* Gordon, 1 Pick. 297, the court decided that a corporation could be bound without a vote, by implication from corporate acts. This, however, was in a suit brought against a corporation, and attended with circumstances extremely well calculated to strengthen every presumption against them. The corporation might have passed the vote, though it was not in the power of the plaintiff to produce it, and their acts afforded the strongest probability in favor of the implication that they had passed it. I should not consider this case as conclusive evidence that the same court would have drawn the same inference from the same circumstances, in a case in which the corporation was plaintiff. But in the case of The Inhabitants of the First Parish in Sutton *v.* Cole, 3 Pick. 232, the corporation was plaintiff, and the validity of an entry into land was one of the points made in the cause. The corporation had appointed two agents for the purpose, but the entry was made by one only. This entry was held to be made not in pursuance of the authority, but it was also held that the action brought by the corporation was a ratification of the entry. This I admit to be a decision expressly in point. But thinking it a case in opposition to

the whole course of decisions in England, as well as in this court, and not supported by decisions in other States, or by a long course of decisions even in the State of Massachusetts, I should not, perhaps, highly respectable as it undoubtedly is, and as I certainly think it, have felt myself warranted in yielding to it, had it even been known to me.

It has been contended that the act of congress incorporating the bank, does not in terms require that it shall keep a record of its proceedings; and from this omission it has *been [*108] inferred that a record is unnecessary. I cannot assent to the correctness of this inference.

When a being is created without the organs of speech, and endowed only with the faculty of communicating its will by writing, we need not look in the laws given by its creator for a prohibition to speak or a mandate to write. These are organic laws which it is compelled to observe. If we find, in the act of its creation, an enumeration of duties and powers which are to be performed and exercised by writing, it is evidence that the creator considered it as certain that the creature would write, and that the evidence of its conformity to the will of the creator would be found in writing. It is equivalent to a declaration that it shall act by writing.

Let the charter be examined with this principle in our minds.

The 8th section empowers the stockholders to choose directors for the management of their affairs, but does not require that the election shall be evidenced by writing. Is it to be believed that congress could have intended that an act, on which all the operations of the corporation depended, which might be controverted in every action it should institute, might rest upon the uncertain and perhaps contradictory recollection of the individuals who were present?

The fairness of an election may be contested; the mode of voting is prescribed by law. Can it be that congress supposed no provision was made which secured written testimony, by which such contests might be tried?

The directors are to elect one of their body as president; is no record to be kept of this election? Can we presume so much carelessness in congress as to suppose it possible that matters of such consequence should be left to the loose proof which the memory of individuals might furnish? The act prescribes the notice which shall be given of the time and place of holding the election; and adds, "it shall be lawful for such election to be then and there made." The legality of the election depends on time and place. Did congress mean that these facts should rest on memory?

The 10th section empowers the directors for the time being

[*109] *to appoint officers, and to allow them a compensation, and to exercise such other powers for the well governing of the officers of the corporation as shall be prescribed by its laws. May all these acts be found only in the frail memory of individuals?

The 4th rule of the fundamental articles provides, that not less than seven directors, of whom the president, or some person deputed by him shall be one, shall constitute a board for the transaction of business; but there is no clause in the charter requiring a board. Can it be pretended that not less than seven directors may make a board, and yet, that the directors may act without being assembled as a board? Congress has not thought it necessary to forbid their acting otherwise than as a board, because the whole law of corporations forbids it.

In the event of making unlawful loans, the directors are made personally responsible; but those are exempted who were absent, or who dissented from the resolution or act whereby the same was so contracted or created.

No clause in the charter directs that loans shall be created only by writing. The bond of the debtor may be said to be sufficient. Yet this clause is obviously drawn in the idea that all the proceedings on the subject would necessarily be in writing. The absentees and dissentients are excused. How is this absence or dissent to be proved? Is it to depend on vague and uncertain memory?

The same observations apply to the limitations and restrictions which are found in the 9th and 10th rules of the fundamental articles.

The 13th rule declares that semiannual dividends shall be made, but does not direct that they shall be declared in writing. May the bank so manage its affairs, that no trace of these dividends shall be found on its books?

The 16th rule declares that no stockholder, unless he be a citizen of the United States, shall vote in the choice of directors, but does not direct that written lists shall be taken. May they be dispensed with? Is the question who has voted to depend on recollection solely?

The 23d section subjects the books of the corporation to the inspection of a committee of either house of congress. But [*110] *there is no clause in the charter which directs the corporation to keep any books. May this be set up as an excuse for not opening books, containing their transactions, for the inspection of a committee of congress?

How are we to account for all these strange omissions? Strange

and unaccountable they would certainly be, on any other hypothesis than that the law of its being required that it should speak and act by writing. Aware of this, congress did not deem it necessary to enjoin upon it that it should act in the only mode in which its organs enabled it to act, and that it should abstain from what its organs did not enable it to do.

It may be said that although certain things ought to appear in writing, it is not necessary that all the transactions of a bank should so appear; and the assent of the directors to the bonds given by their cashiers need not appear. Such grave acts or omissions as may justify the suing out a *scire facias*, to vacate the charter, ought to be evidenced by their records; but such unimportant acts as taking bonds from their officers need not appear. These may be inferred.

I do not concur in this proposition. I neither admit the distinction which has been alleged, nor do I admit that the bond of a cashier is to be classed with unimportant transactions. Congress has not prescribed the intrinsic importance which shall entitle any transaction of a bank to a place on its record, but has legislated on the idea that a record of its proceedings will be kept. And if such a distinction could be found, the bonds of officers, intrusted with all the money of the bank, are among the most interesting of its duties. Congress has manifested this opinion, by enacting, that "Each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond, with two or more sureties, to the satisfaction of the directors, in a sum not less than $50,000, with a condition for his good behavior, and the faithful performance of his duties to the corporation."

Congress, then, considered the bonds to be given by the cashiers as a subject of real importance; and congress was right in this opinion. It requires very little knowledge of the interior of banks, to know that the interests of the stockholders *are committed, [*111] to a very great extent, to these and other officers. It was and ought to have been the intention of congress to secure the government, which took a deep interest in this institution, and to secure individuals who embarked their fortunes in it on the faith of government, as far as possible, from the mal-practices of its officers. One of the means employed for this purpose is the bond required from the cashier. Are the directors at liberty to dispense with this requisition? I think they are not.

Should a committee of congress, on inspecting the books of the corporation, find that cashiers were acting without bonds, would not such gross negligence, such utter disregard of the positive mandate of the law, furnish serious cause for a *scire facias* to vacate the charter?

It has been urged that the rule for which the defendants contend would break in upon all the usages of the bank, invalidate all the notes they have discounted, and destroy their liability for deposits.

I do not think so. I do not profess to understand banking operations; but I think the counsel for the defendants has plainly shown that not a single note is discounted without evidence, in writing, on the note itself or on the books of the bank, or on both. It is admitted that the official acts of the officers of the bank are binding, and, of course, written memorandums made by such officer, in pursuance of orders of the board, whether on the note itself or in a book, is a corporate act, is written evidence of such order of the board of directors as the writing imports. The counsel for the defendant has, I think, shown from "the rules and regulations for conducting the business of the Bank of the United States," as well as from the practice under those rules, that all transactions of that character are, as they ought to be, in writing. He has shown also, conclusively, as I think, that full provision is made both for general and special deposits; and, in my judgment, every difficulty of this description is removed by the 23d rule, which shows that a regular record is, as it ought to be, kept of all the proceedings of the board of directors. So much of that rule as applies to this subject is in these words.

"The proceedings of the board of directors, when con-
[*112] ducting * their business as a deliberative body, shall be governed by the following articles:—

"1. When the president takes the chair, the members shall take their seats.

"2. The minutes of the preceding meeting shall be read before the board proceeds to any other business; and no debate shall be admitted, nor question taken at such reading, except as to errors and inaccuracies. The state of the bank shall then be read, and the discounts settled."

The board, then, does act as a deliberative body, and does keep a minute of its proceedings, which are to be read over and corrected. On what subject does the board deliberate, if not on the measures which are to be taken for the security of its debts, and on the sufficiency of the sureties in the bonds given by the officers who have the management of its funds? Most especially is it bound to deliberate on the bonds to be given by the cashiers of the bank. This is a subject on which the directors are particularly commanded to exercise their judgment, by one of the fundamental articles of the constitution of the corporation. That article requires that "each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond, with two or more sureties, to the satisfaction

of the directors, in the sum of $50,000, with a condition," &c. Is not the sufficiency of this bond, then, most especially a subject for deliberation? If it be, how is this deliberation to be conducted? The rules prescribe the mode with precision, and go so far as to direct that "at the request of any two of the board, the names of the members who make and second a motion, shall be entered on the minutes." The bond must be offered, and the question ought to be put, and must be put, whether it shall be accepted. The acceptance is necessary to the completion of delivery, and is the only proof which can be given of that fact, unless it be delivered to an attorney previously appointed by a board to receive it. Acceptance, undoubtedly includes approbation, but is the deliberate act of the board, and must appear in their minutes. If it must, a copy of those minutes is, in a suit brought by the bank, the only admissible evidence of the fact.

*I think it worthy of remark, that among these rules and [*113] regulations, not one is found which ordains that a record shall be kept, in which the proceedings of the directors shall be inserted. They are framed upon the idea that one must be kept. We find them speaking of the minutes, as if their existence was indispensable and need not be prescribed. Imitating the charter, in this respect, it was deemed unnecessary to ordain that a being should write, whose organization gave it not the means of transacting business otherwise than by writing.

The counsel for the plaintiffs has sought to escape the almost insuperable difficulties which must attend any attempt to maintain the proposition that a corporation aggregate can act without writing, by insisting that the directors are not the corporation, but are to be considered merely as individuals who are its agents.

If this proposition can be successfully maintained, it becomes a talisman, by whose magic power the whole fabric which the law has erected respecting corporations is at once dissolved. In examining it, we encounter a difficulty in the commencement. Agents are constituted for special purposes, and the extent of their power is prescribed, in writing, by the corporate body itself. The directors are elected by the stockholders, and manage all their affairs, in virtue of the power conferred by the election. The stockholders impart no authority to them, except by electing them as directors. But, we are told, and are told truly, that the authority is given in the charter. The charter authorizes the directors to manage all the business of the corporation. But do they act as individuals, or in a corporate character? If they act as a corporate body, then the whole law applies to them as to other corporate bodies. If they act as individuals,

then we have a corporation which never acts in its corporate character, except in the instances of electing its directors or instructing them. The corporation possesses many important powers, and is, as a corporation, to perform many important acts, scarcely one of which is to be performed in a corporate character. They are all to be performed by agents, acting as individuals, under general powers conferred by the charter.

[*114] It cannot escape notice that this rule, if it be one, would apply to almost all corporations aggregate, and would abolish the distinction which has been taken between those which act by an individual, and those which act by an aggregate of persons. The first partakes of the qualities of a sole corporation, the last of a corporation aggregate.

This rule would apply to almost every corporation aggregate which exists, or which ever has existed. The exceptions are the very few in which all the members are active, or in which the corporation acts by a single individual who is its head. All others act by boards usually described in the charter. If the president and directors of the Bank of the United States act as individuals, then it would seem that the managers of every other corporation, being in like manner created by charter, and being in like manner empowered by charter to transact all the affairs of the corporation, would likewise act as individuals, and the whole doctrines of the law upon the subject would find nothing to which they are applicable.

But these doctrines grow out of adjudged cases, and courts have always considered those official agents whose powers are described in the charter, and who act collectively, as acting in a corporate character. The idea has, I believe, never before been suggested, that their acts were to be treated as the acts of individuals. They do not appear as individual acts; they are not in the name of individuals, but of the corporate body. In all the cases which have come before this court, that of The Bank of Columbia *v.* Patterson's Administrators, 7 C. 299, as well as all others, directors are considered as acting in their corporate character. In the cases in England, where the Bank of England has been a party, and in all others, the same view has always been taken of the subject.

The president and directors form, by the charter, a select body, in which the general powers of the corporation are placed. This body is, I think, the acting corporation; and, according to the 4th article of the fundamental rules, seven of them, including the president, or the director deputed by the president, are necessary to constitute a board. The act of the major part of the board, is the act of the whole, and binds the corporation; but this act must, on general

*principles, be done at one and the same time, and at a [*115] regular meeting held for the purpose. Kyd. Corp. 309. Its validity depends on the legal constitution of the board, and on its being the act of the body. These essential requisites must be shown; and to show them, the board must keep a record of its proceedings. Were the by-laws silent on the subject, this would be, as I think, rendered indispensable, by the fact that it is the act of a corporation aggregate.

If there must be a record of their proceedings, and, even were this necessity not absolute, if the by-laws show that there is one, it follows that this record, not the oral testimony of the members or of by-standers, must prove their acts. Their acceptance of any deed or their assent to any contract, if it be their own act, must appear on this record; if it be by agents authorized for the purpose, the vote giving the authority must appear in like manner.

The 6th article of the fundamental rules directs that "each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond, with two or more sureties, to the satisfaction of the directors, in a sum not less than fifty thousand dollars, with a condition," &c.

As the bond is to be given before the cashier enters upon the duties of his office, it must be given before he can rightfully perform any official act; and it will be admitted that the sureties to an official bond are responsible only for the official acts of the officer. This bond cannot be given till it is received, for they are different and equally necessary parts of one and the same act; but, if it could, the law specially requires that it shall be "to the satisfaction of the directors." The "satisfaction" must be as to the sufficiency of the sureties, for the amount of the penalty is fixed by law. This is a subject on which the judgment of the directors must be exercised, and it can be exercised only at a regular meeting of a board legally constituted. This must appear by the record. Any opinion given otherwise is the opinion of individual members, but is not the corporate opinion of the board, is not a corporate act binding on the corporation, or of which the corporation can avail itself.

It appears to me that the bond must be received and approved by the board, before the cashier can regularly perform any official act. This reception and approbation are *required by [*116] the law which enables the corporation to act. They cannot be dispensed with. That they have been performed must be proved or presumed. If they have been performed, they are upon record, for the very act of performance places them upon record. This record, or an authentic copy of it, must, according to the rules of evidence, be produced, that it may prove itself.

May its existence be presumed in this case?

The corporation which claims this presumption, keeps the record, and is now in possession of it if it exists. No rule of evidence is more familiar to the profession than that a paper cannot be presumed under such circumstances.

I have stated the view which was taken by the circuit court of this case. I have only to add that the law is now settled otherwise, perhaps to the advancement of public convenience. I acquiesce, as I ought, in the decision which has been made, though I could not concur in it.

1 P. 46; 7 P. 28; 13 P. 519; 3 H. 292; 6 H. 301; 9 H. 172; 15 H. 143.

WILLIAMS *v.* NORRIS.

12 W. 117.

The written opinion of a state court, filed among the papers, is not a part of the record, and cannot be examined under the 25th section of the Judiciary Act, (1 Stats. at Large, 85,) to ascertain the questions decided.

An order made by a court of a State, after the removal of the record by a writ of error, not by way of amendment, but introducing new matter, cannot be deemed a part of the record.

It must appear by the record that one of the specific questions described in the 25th section of the Judiciary Act necessarily arose, and was determined adversely to the right, &c. claimed under the constitution, or some law or treaty of the United States; otherwise, this court has not jurisdiction.

THIS cause was argued by *White* and *Eaton*, for the plaintiff, and by *Benton* and *Polk*, for the defendant.

MARSHALL, C. J., delivered the opinion of the court.

This is a writ of error to a judgment rendered in the [* 118] * highest court for the State of Tennessee; consequently, this court can exercise no other jurisdiction in the case than is given by the 25th section of the Judiciary Act.

The counsel for the plaintiff in error contend, 1. That an act of congress has been drawn into question in the state court, and that the decision has been against that act.

2. That an act of the legislature of Tennessee, which impairs the obligation of a contract, has been drawn into question, and that the decision has been in favor of the party claiming under that act.

As preliminary to a consideration of these points, it is necessary to inquire whether some additional papers, which have been brought up by a *certiorari*, constitute a part of the record.

These papers are: the opinion of one of the judges, which is supposed to have been delivered and filed as the opinion of the court that decided the cause; and some proceedings which took place in

the same court after the record had been removed into this court by writ of error.

1. Is the opinion a part of the record?

As a general proposition, every gentleman of the profession will, without hesitation, answer this question in the negative. An opinion not given to the jury, pronounced after a verdict was rendered, and, consequently, having no influence on that verdict, which states merely the course of reasoning which conducted the court to its judgment, may explain the views and motives of the court, but does not form a part of its judgment, and cannot constitute a part of the record.

The counsel for the plaintiff does not contend for the general principle, but insists that an act of the legislature of Tennessee makes the opinion a part of the record in the courts of that State.

An act passed in the year 1809, "to establish circuit courts, and a supreme court of errors and appeals," enacts, "that the judges of the court of errors and appeals, as well as the circuit court judges, shall, as to the decisions on all material points, file their opinions in writing among the papers of the cause in which such opinion may be given, within ten days from the delivering of the same."

*This sentence amounts to no more than a provision that [*119] the opinion of the judges shall appear, and shall be preserved with the other papers; but does not make that opinion a part of what is technically denominated "the record" more than the other papers in the cause among which it is filed. Depositions, and exhibits of every description, are papers in the cause, and, in one sense of the word, form a part of the record. In some States they are recorded by direction of law. But, in a jury cause, they constitute no part of the record on which the judgment of an appellate court is to be exercised, unless made a part of it by bill of exceptions, or in some other manner recognized by law. But the plaintiff relies on the succeeding sentence as making the opinions of the judges a part of the record. That sentence is in these words: "And where a writ of error shall be allowed to reverse the judgment of any circuit court in any cause, the clerk thereof shall send a transcript of the opinion of the judge to the court of errors and appeals, with the balance of the record in the cause properly certified." It is contended that the words "balance of the record," show the intention of the legislature that the opinion of the judge shall constitute a part of that which is technically the record.

The capacity of a legislature to control the proceedings of courts is not questioned, and if its will be unequivocally declared, that will must be obeyed; but in construing a law, implications are not to be drawn from careless expressions, which would produce unreasonable

results, and subvert the usual course of legal proceedings. Can the opinion of the judge introduce any fact into the cause? Where a judgment is rendered on a special verdict, for example, can he, by an opinion filed ten days afterwards, control the facts found in that verdict? Or can he, by any thing inserted in his opinion, warrant any legal inferences which the verdict itself would not justify, or in any manner change the legal effect of the finding? If the opinion cannot produce these results, for what purpose is it introduced into the record?

It can be introduced for no other purpose than to suggest [* 120] to the superior court those arguments which might * otherwise escape its notice, which operated in producing the judgment, and which, in the opinion of the legislature, ought to be weighed by the superior court, before that judgment should be reversed or affirmed. If the judgment should be correct, although the reasoning by which the mind of the judge was conducted to it should be deemed unsound, that judgment would certainly be affirmed in the superior court. We cannot, therefore, imply from the loose expression which has been cited, so extraordinary a result as that the opinion of the court, filed after judgment, as an argument, should be considered as a part of what is technically denominated the record, or should be a supplement to the verdict. In the present case, the opinion which was filed has been inspected, and seems to have been founded on a construction of the laws of the State, without calling into question the constitution of the United States or any act of congress. This, however, is not relied on, because, as has been stated, the opinion has no other influence on the cause than it would have had if published in a book of reports.

If the court could have doubted on the proper construction of this section, the fact that it has never been understood in the courts of the State in the sense for which the counsel for the plaintiff in error now contends, would be conclusive on the question. It is also not entirely unworthy of remark that so much of the section as requires the judges of the circuit court to file their opinions in writing, was repealed before the judgment in this case was pronounced; consequently that part of the section which contains the words by which the doubt was created, form no longer a part of the law.

The *certiorari* has also brought up a supplemental record, which contains a motion made in the state court by the plaintiff in error, after the cause had been removed into this court, to amend the record or entries of the judgment, by inserting the questions which were decided by the judges. The reasons for and against this motion are spread upon the record; and the facts, which would give jurisdiction

to this court, are asserted by the one party and denied by the * other. The court took time for advisement, and does [* 121] not appear to have granted or rejected the motion.

This court is decidedly of opinion that no orders made in the court of the State, after the removal of the record into this court by writ of error, not made by way of amendment, but introducing new matter, could be brought into it or could in any matter affect it. The cause must be tried on the record as it stood when removed, not upon the subsequent proceedings which were pressed in the state court after its final judgment was given. In the present case, nothing is before the court but the original record.

That record exhibits a *caveat* against the issuing of a grant on a survey, made for the defendant, and assigns various causes why it should not be issued. The plaintiff claimed under a patent from the State of Tennessee; and the *caveat* was the proper process to contest the right of the defendant. On the trial, a jury, in pursuance of the act of the legislature of that State of 1807, c. 1, s. 8, was "impanelled and sworn for finding such facts as are material to the cause, and not agreed on by the parties." The jury found, 1. That on the 3d day of May, 1784, Ezekiel Norris made his entry in the office of John Armstrong, entry taker of western lands, reciting the words of the entry. In the margin, the following words are inserted, "detained for non-payment."

2. That on the 18th of November, 1815, a duplicate warrant of survey was issued by the commissioner of West Tennessee, to the said Norris, a copy of which is annexed.

3. The third fact is, that the entry was special; and the 4th, that the tract of land which the entry called to adjoin was notorious.

5. That the original warrant, No. 2047, to Ezekiel Norris, issued and was filed in the comptroller's office of North Carolina, without any indorsement thereon; that it was detained for non-payment. The copy of the warrant is found, and is incomplete, being without the signature of John Armstrong, the entry taker.

The caveatee required the jury to find, as a fact, that the purchase money was paid by Norris, and that the memorandum in the margin, "detained for non-payment," was a * fraudulent [* 122] entry. The jury refuse to find this fact, and, in its stead, find "that it is not proved to them that the consideration, at the rate of £10 per hundred for every hundred acres, for the entry of the said Ezekiel Norris, in question, was duly paid to John Armstrong, entry taker, &c., and that afterwards it was falsely and fraudulently inserted in the margin of the entry book containing said entry, and opposite to the same, by some person, 'detained for non-payment.'"

The act of North Carolina, which authorized entries to be made in John Armstrong's office, contains the following enactment: That every person claiming, before he shall be entitled to enter a claim for any of the said lands, shall pay into the hands of the entry taker, at the rate of ten pounds in specie, or in specie certificates at their nominal value, &c., for every hundred acres so entered.

The 19th section directs every entry taker within the State to make out and deliver to the surveyor, on or before the first day of April and the first day of October annually, the warrants for the several entries, (which are not disputed,) made in his office, with an indorsement prescribed by law, showing the number and date of the entry.

The circuit court for the county of Lincoln decided that Williams, the caveator, had the better right. This judgment was carried to the court of errors and appeals, by writ of error, where it was reversed, and the *caveat* dismissed.

That judgment is now before this court; and in considering it we are confined to the inquiry, whether the record shows any misconstruction of an act of congress or of the constitution of the United States.

In 1789, North Carolina ceded her western territory to the United States, reserving to herself the right of perfecting titles in all cases where entries had been made according to law.

Under this reservation, several acts were passed, directing warrants of survey to be issued on entries made in John Armstrong's office, where the purchase-money had been or should be paid.

In 1796, Tennessee was erected into a State. In 1803, North Carolina entered into a compact with the State of Ten-
[*123] nessee, *in which the former ceded to the latter the power to issue grants and perfect titles to all claims of land lying in the said State, which power had been reserved to herself by North Carolina, in her acts ceding her then western territory to the United States. This compact was assented to by congress.

In 1806, congress passed an act ceding[1] to the State of Tennessee all the rights of congress to lands lying east and north of a line described in the act.

The land in controversy is within the territory thus ceded by congress.

If any stipulation in the compact between North Carolina and Tennessee could have affected the controversy between Williams and Norris, it must have been because the title of Norris came within the reservation made by the State of North Carolina, in her act of

[1] 2 Stats. at Large, 382.

cession to congress. That reservation was the subject of the compact. As the controversy was not between two persons, claiming under North Carolina, but between a person claiming under North Carolina and one claiming under the State of Tennessee, and the decision was in favor of the title set up under North Carolina, we cannot perceive how that decision can be considered as a violation of the compact. North Carolina stipulates that titles should be issued by the State of Tennessee, for lands to which there were valid claims under her laws, and for which patents might have been issued by her, had the compact not been made. If the title of Norris was valid, according to the laws of North Carolina, then the decision in his favor is in pursuance of the compact; if it was not valid, according to those laws, then the case is not within the compact. In either view of it, the compact has not been violated.

The act which gives the sanction of congress to this agreement, also cedes to Tennessee a large territory, comprehending the lands in controversy. This cession is made on several conditions, one of which respects all existing claims to lands under the State of North Carolina. Its operation is understood to be, so far as it can affect the case now before the court, precisely the same with that of the compact between the two States. The same observations *apply to it as were applied to that instrument. The title, [*124] for the benefit of which it was intended, if it has any influence in the case, has prevailed. Consequently, neither the compact between the States, nor the act of congress which assents to that contract, and which confers on the State of Tennessee the power to perfect titles in the district of country which comprehends the lands in controversy, can have been violated.

A point of rather more difficulty remains to be considered. It is contended that the validity of a statute of the State of Tennessee has been drawn into question in this case, on the ground of its being repugnant to the constitution, and the decision has been in favor of its validity.

The act supposed to be unconstitutional is, "an act for the relief of Ezekiel Norris."

It is not stated in the record that the constitutionality of this act was drawn in question; and the 25th section of the Judiciary Act declares that "no error shall be assigned or regarded but such as appears on the face of the record, and immediately respects the before mentioned questions of validity, or construction of the said constitution," &c. The case of Miller *v.* Nicholls, 4 W. 311, has been relied on to prove that it is not necessary to the jurisdiction of the court that the record should, in terms, state a miscon-

struction of the act of congress, or that it was drawn in question. It is sufficient to give the court jurisdiction, that the record should show that an act of congress was applicable to the case.

The case of Miller *v.* Nicholls was a claim filed by Mr. Dallas, the attorney of the United States, for a sum of money brought into a State court of Pennsylvania, to be disposed of by the court. The money belonged to a debtor of the United States, who was also indebted to the State of Pennsylvania. The court decreed the money to the State, in pursuance, it is presumed, of an act of the legislature, giving the State a preference. The case was brought, by writ of error, into this court, upon the allegation that the judgment was in violation of the act of congress, which gives priority to the United States in all cases of insolvency.[1] This court [*125] dismissed the writ of error, because, the fact of *insolvency not having been shown, it did not appear from the record that the act of congress, or the constitutionality of the state law, was drawn into question. The court added that the record need not state, in terms, a misconstruction of the act of congress, or that it was drawn in question.

The act of congress applies to every insolvent debtor of the United States, and gives them priority as to all the property of the debtor which he possessed when the insolvency took place; but it applies only to cases of insolvency. Had the record shown that this was a case of insolvency, so that the act of congress applied to it, that act must have been misconstrued, or its obligation denied, when the court decreed the money to the State of Pennsylvania; and the court was of opinion that the act could not have been evaded by the omission to refer to it in the judgment, or to spread it on the record.

To apply the principle of that case to this, it will be necessary to show that the title of Norris depended on the act passed in his favor by the legislature of Tennessee, and that the act was repugnant to the constitution.

That act is in these words: "Be it enacted," &c., "that the commissioner of West Tennessee be, and he is hereby authorized to issue to Ezekiel Norris, certificates or warrants to the amount of 2,280 acres, being the amount of two entries, No. 2,046 for 1,000 acres, and No. 2,047 for 1,280 acres, on which no warrants or grants were issued; provided, that the said Ezekiel Norris shall produce sufficient evidence to the said commissioner that the consideration for said entries was paid, and that no warrant or grant ever issued on said entries."

[1] 1 Stats. at Large, 515.

When this act passed, a patent had been granted by the State of Tennessee, to the plaintiff in error, comprehending a part of the land covered by the entry of Norris. If its effect was to annul that patent, and to give a new title to Norris, the act would come within the decision of this court in the case of Fletcher *v.* Peck, 6 C. 87, as a law impairing the obligation of contracts. In determining whether such was its effect, it is necessary to inquire whether Norris's entry was absolutely void, or gave an incipient title, capable of being *carried into grant. If the purchase-money was [*126] paid, the entry was valid. If not paid, the entry might be void, or only voidable. The words of the act under which it was made have been cited, and may admit of either construction. It is a question for the legislature and courts of the State, and its decision the one way or the other would not be repugnant to the constitution of the United States. It is apparent that the legislature of North Carolina has not considered these entries, where the purchase-money was not paid at the time, as being absolutely void, but has supposed them to be capable of being perfected and carried into grant, as the legislature might direct.

In 1794, the comptroller was directed to issue warrants in all cases in which the purchase-money had been paid.

In 1796, it was enacted that no grants should issue on warrants on entries made in John Armstrong's office, unless it should appear, by Armstrong's books, or other sufficient testimony, that the purchase-money had been paid. The next succeeding section of the same act authorizes any person entitled to such entry to pay into the treasury the amount or balance of the purchase-money, upon which a warrant may be issued.

In 1798, the legislature appointed commissioners to investigate the frauds suggested to have been committed in the secretary's office, and directed that no grant should issue on warrants obtained on entries which the commissioners might deem fraudulent.

The act of 1799, c. 7, s. 16, directs warrants to issue on all entries where the requisites of the law have been or shall be complied with.

The legislation of North Carolina, to the year 1803, proceeds upon the idea that the entries made in John Armstrong's office, for which the purchase-money had not been paid, were not absolutely void, but might be made good by paying the purchase-money, or such part of it as remained due. The right seems to have been considered as preserved and suspended until the purchase-money should be paid. In this state of things, the power of perfecting titles, which had been retained by North Carolina in her cession act. was

transferred to Tennessee, on condition that titles should be
[*127] *perfected, or entries made, under the laws of that State, according to the requisites of those laws.

In 1806, c. 1, s. 45, the legislature of Tennessee appointed commissioners to decide on the validity of entries, with directions to admit no warrants on entries made in John Armstrong's office, if it may appear to the said commissioners that the purchase-money has not been paid.

By the act of 1807, c. 20, s. 25 and 29, it is enacted, that where it shall appear to either of the commissioners, that entries have been made in John Armstrong's office, on which the purchase-money has been paid, in whole or in part, warrants may issue for so much land as has been paid for. But it is provided that the person exhibiting such claim, shall produce a certificate from the comptroller of North Carolina, showing what sum was paid on the said entry. This act was continued in force till the 1st of January, 1815. In October, 1815, an act passed, directing that there should be one commissioner in East and one in West Tennessee, each of whom should exercise the powers which had been vested in commissioners by the act of 1806.

We do not understand that the propriety or obligation of these acts has ever been questioned by the courts of either North Carolina or Tennessee. We do not understand that the courts of either State have ever questioned the legislative construction of the act, opening the office in which this entry was made. That construction is, that entries received by John Armstrong, though not accompanied by the purchase-money, were not absolutely void, but would become valid should the purchase-money be afterwards paid; and that such proof of payment might be received as the legislature should prescribe. It cannot be doubted that numerous titles are held under this construction of the law. Its correctness or incorrectness does not seem to involve any constitutional question, or any question which can give this court jurisdiction in a cause which has been determined in a state court.

Had the claim of Ezekiel Norris been decided by the commissioners acting under the general law, it would probably never have been contested. What difference is there, so far as respects its
[*128] constitutionality, between the *act passed in his particular case, and the act containing a general reference of all cases of the same description to the commissioner? The difference consists solely in this: the general act admits no other proof of payment than a certificate from the comptroller of North Carolina; the particular act authorizes the commissioner to establish the claim on suffi-

dent evidence; that is, we presume, on such evidence as is generally admissible in a court of justice. We know of no principle which could impose on the legislature of the State the necessity of exacting from the claimant, under an entry made in John Armstrong's office, as indispensable to the establishment of his claim, a certificate from the comptroller of North Carolina, that the purchase-money had been paid. The act of 1794 left the fact of payment open to legal proof. The act of 1796 required that it should appear by Armstrong's books or other legal testimony. If, then, the general act of Tennessee had allowed the commissioner to issue warrants on sufficient proof, such act might have been questioned on the ground of policy, but not of right.

If this be correct, if the legislature might have dispensed with this testimony in a general law, why may it not be dispensed with in a particular law, where its effect on the cause is precisely the same as if it had been general? There are, undoubtedly, great and solid objections to legislation for particular cases. But these objections do not necessarily make such legislation repugnant to the constitution of the United States.

The act "for the relief of Ezekiel Norris," did not authorize the commissioner to grant him a certificate or warrant on his entry, unless he should prove that the purchase-money had been paid. The laws had preserved such entries, and, consequently, an act to enable the proprietor of one of them to prosecute his claim, is not necessarily an act impairing the obligation of a contract.

The question whether the judgment of the commissioner was conclusive evidence that the purchase-money had been paid, is entirely distinct from the constitutionality of the law, and the decision of the state court upon it cannot be revised in this court.

*We are of opinion that this record does not exhibit a [*129] case of which this court can take jurisdiction, and that the writ of error ought, therefore, to be dismissed.

2 P. 245, 380; 3 P. 292; 4 P. 410; 5 P. 190; 6 P. 41; 10 P. 368; 5 H. 343.

MONTGOMERY, Plaintiff in Error, *v.* HERNANDEZ and others, Defendants in Error.

12 W. 129.

Under the 25th section of the Judiciary Act, (1 Stats. at Large, 85,) it is not every misconstruction of an act of congress which can be reëxamined; the decision must have been against some right, &c., so claimed under such an act.

This court cannot reëxamine the decision of a state court allowing an action on a marshal's bond in the name of the person injured.

Under such a bond the cause of action does not accrue to a party plaintiff, whose judgment the marshal fails to satisfy, until the final judgment has been rendered, though he may have before that time wrongfully used money in his hands bound for the judgment.

[* 130] * This cause was argued by *Ogden*, for the plaintiff in error, and by *Key*, for the defendants in error.

Trimble, J., delivered the opinion of the court.

This case is brought up, by writ of error, from the highest court of law of the State of Louisiana.

The case is, that the defendants in error instituted a suit, in their own names, in the district court of the State for the first judicial district, upon the bond given by Michael Reynolds to the United States, as marshal of the district of Louisiana, conditioned to be void upon his "well and faithfully executing the duties of his said office;" and the plaintiff in error having executed the bond, as one of the marshal's sureties, and the marshal having since died, the suit was brought against the plaintiff in error, and the said Reynolds's personal representative.

The breach of the condition of the bond alleged is, that, by the order of the district court of the United States for the district of Louisiana, in a suit in admiralty, wherein the defendants in error were libellants against the schooner Estrella and her cargo, the vessel and cargo were directed, by the court, to be sold by the marshal, and the proceeds of the sale held by the marshal, subject to the order of the court; that the marshal, in pursuance of that order, sold the vessel and cargo, and received the money; that the court of admiralty, by its final decree in the cause, directed the vessel and cargo, or the proceeds thereof, to be restored to the libellants; and that the marshal had failed to pay over to the libellants $3,126, part of the proceeds, as was his duty, under the final order and decree of the court. The suit having been commenced and prosecuted, by petition,
[* 131] according to the practice of the civil * law which prevails in Louisiana, the respondent, Montgomery, put in his answer, admitting the execution of the bond, but insisting that, as the bond was executed to the United States, and the defendants in error no parties to it, they had no right or interest in the bond, and could not sue for a breach of the condition thereof; and denying the breaches alleged in the petition. By a supplemental answer, in the nature of a plea of the act of limitations, Montgomery alleged, if any breach had taken place, that more than six years had intervened since the cause of action, before the institution of the suit.

The record states, that the jury sworn in the cause, after hearing testimony, and receiving a charge from the court, returned a verdict

for the defendants in error for the sum of $3,126; for which sum judgment was rendered upon the verdict in their favor. From this judgment Montgomery appealed to the supreme court of the State, where the judgment of the district court was affirmed; and this judgment is sought to be reversed in this court upon the present writ of error.

On the trial of the cause in the district court, Montgomery objected to the admission, as testimony to the jury, certain documents purporting to be accounts of the marshal's sales of The Estrella and cargo; and his objections being overruled, he excepted to the opinion of the court admitting the papers offered; and his exception was sealed and made part of the record.

The appellate jurisdiction of this court, in cases decided in the state courts, is very special and limited in its character. By the 25th section of the Judiciary Act, made in pursuance of the constitution, it is provided: "That a final judgment or decree, in any suit in the highest court of law or equity of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their *validity; or where is] *132] drawn in question the construction of any clause of the constitution, or of a treaty, or statute of or commission held under the United States; and the decision is against the title, right, privilege, or exemption, specially set up by either party, under such clause of the constitution, treaty, statute, or commission, may be reëxamined and reversed or affirmed in the supreme court of the United States."

Under these provisions, we have no authority to reëxamine the whole case. We can reëxamine so much and such parts of it only as come within some one or other of the classes of questions enumerated in the act of congress, and so much of the case as must necessarily be decided to arrive at such question.

It has been insisted, for the plaintiff in error, that the question raised upon the record, whether Hernandez, not being a party to the marshal's bond given to the United States, could maintain a suit upon it in his own name only, without suing in the name of the United States, for his use, is a question which can be reëxamined in this court. We are not of that opinion. It is not every misconstruction of an act of congress by a state court, that will give this court appellate jurisdiction. It is where the party claims some title,

right, privilege, or exemption, under an act of congress, and the decision is against such right, title, privilege, or exemption.

In this case the plaintiff in error did not, and could not claim any right, title, privilege, or exemption, by, or under the marshal's bond, or any act of congress giving authority to sue the obligors for a breach of the condition; or, at most, his claim to exemption rests upon form, and not substance, as the law expressly charges him, and the objection is only that the name of the United States should have been inserted for the use of the plaintiff.

However we might be inclined to the opinion that, regularly, and in point of form, the suit should have been in the name of the United States, for the use of Hernandez, we have no jurisdiction or authority to reëxamine, and either reverse or affirm the decision of the state court on that ground.

[*133] * The only part of the case over which we can rightfully exercise appellate jurisdiction, is that raised by the supplemental answer, pleading the prescription or bar of six years; ir. which the party claims an exemption under the laws of the United States, from liability as surety of the marshal; the decision in the state court being against the exemption so specially set up by him.

The act of congress passed in 1806,[1] relating to bonds given by marshals, enacts: "That all suits on marshals' bonds, if the cause of action has already accrued, shall be commenced and prosecuted within three years after the passage of this act, and not afterwards; and all such suits, in case the right of action shall accrue hereafter, shall be commenced and prosecuted within six years after the said right of action shall have accrued, and not afterwards," &c. Ingersoll's Dig. 402.

It is obvious that whether this act of congress exempts the plaintiff in and from responsibility or not, must depend upon the time when the right of action accrued to Hernandez and Co., for any injury sustained by reason of the marshal's failure to perform his duty. It was the duty of the marshal, under the order of the court of admiralty, directing him to sell The Estrella and cargo, and hold the proceeds subject to the future order of the court, to bring the money into court as soon as received by him, in order that it might be deposited in the Branch Bank of the United States. The order of the court directing the marshal to hold the proceeds until the further order of the court, can only be construed to mean that he should hold them in the manner prescribed by law. The law directs the money to be deposited in the name of and to the credit of the court; and provides, that the money so deposited shall not be drawn out of bank without the order of the court. The object of the

[1] 2 Stats. at Large, 374.

law was to prevent the officers of the court from holding money, in such cases in their own hands, and converting it to their own use. It was only a partial execution of the precept of the court to sell the vessel and cargo; its mandate was not faithfully performed until the proceeds were brought into court by him, in order to be deposited according to law, or until he paid it over to Hernandez, as *directed by the final decree and order of court. The mar- [*134] shal's failure to bring in the money, or pay it over to Hernandez and Co. was a violation of his duty, and a breach of the condition of his bond.

The supreme court of the State decided, that although the breach of the condition of the bond took place more than six years before the institution of this suit, yet the plaintiff's right of action did not accrue until within the six years; and that, consequently, the act of limitations constituted no bar to the action. This court perfectly accords in opinion with the supreme court of the State.

If it be true that the condition of the bond was broken at the time the marshal failed to bring the money into court to be deposited in the bank, or pay it over to Hernandez and Co.; and if it be true that the breach of the condition of the bond was to the injury of Hernandez and Co.; yet it is not true that Hernandez and Co. had, at that time, any right of action. The record of the proceedings in the court of admiralty shows that The Estrella and cargo were sold, and the proceeds received by the marshal; and that the suit was finally decided in the district court, on the day of , 1817; by which final decree the proceeds were ordered to be paid over to Hernandez and Co.

An appeal was presented from that decree in this court; where it was affirmed at the February term, in the year 1819, within less than six years before the institution of this suit.

It is perfectly clear that Hernandez and Co. had no right to demand of the marshal the proceeds of the sales, or to sue for the recovery thereof, until after the affirmance in this court. The right of action was suspended during the pendency of the appeal in this court; and during such suspension the statute of limitations did not run against him.

We are, therefore, of opinion, that the supreme court of Louisiana have misconstrued neither the act of congress limiting actions upon marshals' bonds to six years from the time the right of action accrues, nor any other act of congress, to the prejudice of the plaintiff in error.

Judgment affirmed, with costs and six per cent. damages.

5 P. 190; 7 H. 738; 9 H. 421; 10 H. 311.

Winn's Heirs v. Jackson and others.

12 W. 135.

In this case, on motion of Mr. Wickliffe, the court dismissed a writ of error to the court of appeals of the State of Kentucky, the record showing that after the judgment of the circuit court for Harrison county had been reversed by the court of appeals, the case was remanded to the circuit court for further procedings, and so the judgment was not "final."

5 P. 190.

The Postmaster-General of the United States v. Early and others.

12 W. 136.

Under the act of March 3, 1815, (3 Stats. at Large, 245, sec. 4,) the circuit courts of the United States have jurisdiction of suits by the postmaster-general, upon official bonds of postmasters.

Though a mistaken opinion of the legislature concerning the law does not make the law, yet it may be so declared as to operate *in futuro*.

The postmaster-general has power to take a bond from a postmaster for the payment of moneys received by him in his official capacity.

Including in an official bond other things which are separable from the subjects for which it may lawfully be taken, does not necessarily vitiate it.

This was an action of debt, commenced in the circuit court for the district of Georgia, by the district attorney of the United States for that district, in the name of the postmaster-general of the United States, against the defendants, on a bond executed by them, in June, 1820, to the postmaster-general of the United States, the condition of which, after reciting that Eleazer Early, (one of the coöbligors and defendants in the suit,) is postmaster at Savannah, provides that if he shall perform the duties of his office, "and shall pay all moneys that shall come to his hands for the post-
[*137] ages of whatever is by law chargeable *with postage, to the postmaster-general of the United States for the time being, deducting only the commission and allowances made by law for his care, trouble, and charges, in managing the said office," &c., "then the above obligation shall be void." The breach assigned was, that the said E. Early did not pay to the postmaster-general the moneys which came to his hands, as postmaster at Savannah, but that the sum of $7,736.64 was still in arrear and unpaid. The defendants pleaded to the jurisdiction of the court that this was "not a suit in which the United States are a party, nor is the debt declared on one contracted, authorized, or arising, under a law

of the United States, and over which jurisdiction has been given to this honorable court." On the argument of the cause in the court below, the opinions of the judges of that court were opposed upon the question of jurisdiction, and it was certified to this court for a final decision.

The *Attorney-General* and *Wheaton*, for the plaintiff.

Webster and *Berrien*, for the defendants.

*MARSHALL, C. J., delivered the opinion of the court, and, [*144] after stating the case, proceeded as follows: —

The post-office department was established at the commencement of the Revolution, under the superintendence of a postmaster-general, who was authorized to appoint his deputies, and was made responsible for their conduct. Soon after the adoption of the present government, in September, 1789, congress passed a temporary act,[1] directing that a postmaster-general should be appointed, and that his powers, and the regulations of his office, should be the same as they last were, "under the resolutions and ordinances of the last congress." The power of appointing deputies, therefore, and the responsibility for their conduct, still remained with the postmaster-general.

This act was continued until the first day of June,[2] 1792. In February, 1792, an act was passed detailing the duties and powers of the postmaster-general, and fixing the rates of postage.[3] It directs his deputies to settle at the end of every three months, and to pay up the moneys in their hands; on failure to do which, it becomes the duty of the postmaster-general "to cause a suit to be commenced against the person or persons so neglecting or refusing. And if the postmaster-general shall not cause such suit to be commenced within three months from the end of every such three months, the balances due from every such delinquent shall be charged to and recoverable from him." This act was to take effect on the first of June, 1792, and to continue for two years. In May, 1794,[4] a permanent act was passed. It retains the provision requiring the postmaster-general to settle quarterly with his deputies, but omits that which makes it his duty to cause suits to be instituted within three months after failure.

In March, 1799,[5] the subject was again taken up, and congress passed an act, which retains the clause making it the duty of the deputy postmasters to settle their accounts quarterly, and reinstates that which directs the postmaster-general to cause suits to be insti-

[1] 1 Stats. at Large, 70. [2] Ib. 178. [3] Ib. 232. [4] Ib. 354. [5] Ib. 733.

tuted against delinquents; substituting six months in the place of three, after the expiration of the quarter, under the penalty of being himself chargeable with the arrears due from such delin-
[*145] quent. This *act declares that all causes of action arising under it may be sued before the judicial courts of the several States, and of the several territories of the United States.

In April, 1810,[1] congress passed an act for regulating the post-office establishment, which enacts, among other things, that all suits thereafter to be brought for the recovery of debts or balances due to the general post-office, should be instituted in the name of "the postmaster-general of the United States." This act also authorizes all causes of action arising under it to be sued in the courts of the States and territories.

In March, 1815, congress passed "an act to vest more effectually in the state courts, and in the district courts of the United States, jurisdiction in the cases therein mentioned."

This act enables the state courts to take cognizance of all suits arising under any law for the collection of any direct tax or internal duties of the United States. The 4th section contains this clause: "And be it further enacted, that the district court of the United States shall have cognizance, concurrent with the courts and magistrates of the several States, and the circuit courts of the United States, of all suits at common law where the United States, or any officer thereof, under the authority of any act of congress, shall sue, although the debt, claim, or other matter in dispute, shall not amount to one hundred dollars." On these several acts the question of jurisdiction depends.

The suit is brought for money due to the United States; and, at any time previous to the act of 1810, the suit for the money, had no bond been taken, might have been brought in the name of the United States. It is not certain that, independent of the bond, it could have been instituted in the name of any other party. The courts of the United States, had, of course, jurisdiction. The laws make it the duty of the postmaster-general to "cause suits to be instituted," not to bring them; and it was not until March 1799,[2] that congress authorized these suits to be instituted in the state courts. It is obvious that the right to institute them in those courts, anterior to the passage of that act, was doubted; at any rate, was not
[*146] exercised; for it could not have *been deemed necessary to give expressly the power to sue in those courts, had the power been admitted to exist, and been commonly exercised. We must suppose, then, that these suits were usually instituted in the

[1] 2 Stats. at Large, 592. [2] 1 Ib. 740.

courts of the United States; and no doubt could be entertained on the question of jurisdiction, if they were brought, as they certainly might have been, in the name of the United States.

The act of 1810 directed that all suits for debts, or balances due to the general post-office, should be brought in the name of the postmaster-general. The manner in which this change in the style of the suit might affect jurisdiction was not noticed, and no provision was made for this new state of things. These debts and balances which were due to the general post-office, were not due to the officer personally, but to the office, and were to be sued for and collected for the United States. The money belonged to the nation, not to the individual by whose agency it was to be brought into the treasury. The whole course of opinion and of legislation on this subject is, that although for convenience, and to save expense to the debtors, recourse may be had to the state courts for the recovery of small sums, yet a right to resort to the courts of the Union in suits for money due to the United States, was never intended to be relinquished. If the effect of any provision in a statute be to abolish this jurisdiction, it must be an effect which was neither intended nor foreseen. That construction which will produce a consequence so directly opposite to the whole spirit of our legislation, ought to be avoided, if it can be avoided without a total disregard of those rules by which courts of justice must be governed.

If the question had rested solely on the act of 1810, it is probable that the aid of the legislature might have been thought indispensable to the jurisdiction of the federal courts, over suits brought for the recovery of debts and balances due to the general post-office. But it does not rest solely on that act. The act of 1815 contains a clause which does, we think, confer this jurisdiction. It cannot be doubted that this clause vests jurisdiction expressly in the district courts, in all suits at common law where any officer of the United States sues under the authority of any act of *congress. [*147] The postmaster-general is an officer of the United States, who sues under the authority of the act of 1810, which makes it his duty to sue for debts and balances due to the office he superintends, and obliges him to sue in his own name.

It has been contended that this clause, if it gives jurisdiction, gives it only where the demand is under $100. We do not think the words will sustain this criticism.

The right to take cognizance of suits brought by any officer of the United States, under authority of any act of congress, is first given in general words, comprehending sums to any amount. The limitation which follows is not a proviso that the sum shall not exceed the

sum of $100; it is no restriction on the previous grant, but an enlargement of it, if an enlargement should be thought necessary. This act might be construed, in connection with the Judiciary Act of 1789,[1] and a general clause giving jurisdiction might be limited as to amount to the sum mentioned in the 9th section of that act. The subsequent words, therefore, of the section we are considering, were introduced for the purpose of obviating this construction, and removing the doubt which might otherwise exist, of the right to take cognizance of sums less than $100. After giving the jurisdiction generally, the words are, "although the debt, claim, or other matter in dispute, shall not amount to $100." These words do not confine the jurisdiction previously given to $100, but prevents it from stopping at that sum.

The jurisdiction of the district courts, then, over suits brought by the postmaster-general, for debts and balances due the general post-office, is unquestionable. Has the circuit court jurisdiction?

The language of the act is, that "the district court shall have cognizance concurrent with the courts and magistrates of the several States, and the circuit courts of the United States, of all suits," &c. What is the meaning and purport of the words "concurrent with" the circuit courts of the United States? Are they entirely senseless?

[*148] Are they to be excluded from the clause in which the legislature has *inserted them, or are they to be taken into view, and allowed the effect of which they are capable?

The words are certainly not senseless. They have a plain and obvious meaning. And it is, we think, a rule, that words which have a meaning, are not to be entirely disregarded in construing a statute. We cannot understand this clause as if these words were excluded from it. They, perhaps, manifest the opinion of the legislature, that the jurisdiction was in the circuit courts; but ought, we think, to be construed to give it, if it did not previously exist. Any other construction would destroy the effect of those words. The district court cannot take cognizance concurrent with the circuit courts, unless the circuit courts can take cognizance of the same suits. For one body to do a thing concurrently with another, is to act in conjunction with that other; it is equivalent to saying, the one may act together with the other. The phrase may imply that power was previously given to that other; but if, in fact, it had not been given, the words are capable of imparting it. If they are susceptible of this construction, they ought to receive it, because they will otherwise be totally inoperative, or will contradict the other parts of the sentence, which show plainly the intention that the district court shall have cognizance of the subject, and shall take it to the same extent with the circuit courts.

[1] 1 Stats. at Large, 73.

It has been said, and perhaps truly, that this section was not framed with the intention of vesting jurisdiction in the circuit courts. The title of the act, and the language of the sentence, are supposed to concur in sustaining this proposition. The title speaks only of state and district courts. But it is well settled that the title cannot restrain the enacting clause. It is true that the language of the section indicates the opinion that jurisdiction existed in the circuit courts, rather than an intention to give it; and a mistaken opinion of the legislature concerning the law, does not make law.

But if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the past, may act *in future. This [*149] law expresses the sense of the legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction. We think, therefore, that in a case plainly within the judicial power of the federal courts, as prescribed in the constitution, and plainly within the general policy of the legislature, the words ought to receive this construction.

So far as the suits brought by the postmaster-general were referred to in argument, in the case of The Bank of the United States *v.* Osborn, 9 W. 738, this construction was assumed as unquestionable. As the act was referred to for the sole purpose of illustrating the argument on the point then under consideration, it was not examined with the attention which has since been bestowed upon it; but the opinion then expressed, that the section we have been considering conferred jurisdiction on the courts of the United States over suits brought by the postmaster-general, was correct.

Had this suit been brought to recover the balance due from the deputy postmaster, on his original liability to pay the money in his hands, no doubt would have been felt respecting the jurisdiction of the court. The act of 1810 gives the postmaster-general a right to sue for such balances, and the act of 1815 enables him to sue in the circuit or district courts of the United States. But it is contended that he has no right to secure such balances by bond; and, consequently, the bond being unauthorized, the act of congress cannot be construed to authorize a suit upon it.

Were it even true that an official bond cannot be taken in a case where it is not expressly directed by law, we do not think that a bond taken to secure the payment of a sum of money is void, because it is also an official bond. Even supposing this bond to be void so far as it is intended to stipulate for the performance of official duties, it is not necessarily void so far as it stipulates for the payment of money

of the United States, which might come to the hands of the deputy postmaster. That part of the condition which shows the bond was taken to secure the payment of money which should be received for the United States, is not vitiated by that part of it which [*150] shows that it was also taken * to secure the general official conduct of the deputy. Now, a part of the condition is, expressly, "that if he shall pay all moneys that shall come to his hands, for the postages of whatsoever is by law chargeable with postage," then the obligation is to be void. The obligation itself, on which the suit is brought, was intended to secure the payment of money collected for the United States, as well as the official conduct of the deputy; and as no law prohibited such an official bond, we cannot think, although it might not in itself be valid, that it would destroy an obligation taken for a legitimate purpose. As the breach assigned is altogether in the non-payment of the money collected, we do not think that, if a bond would be good, taken for this single object, it is made bad by being extended also to the official conduct of the obligor.

The inquiry then is, whether, under a fair construction of the acts of congress, the postmaster-general may take bonds to secure the payment of money due, or which may become due, to the general post-office.

All the acts relative to the post-office make it the duty of the postmaster-general to superintend the department, to regulate the conduct and duties of his deputies, and to collect the moneys received by them for the general post-office. May not these powers extend to taking bonds to the officer who is to perform them? May not these bonds be considered as means proper to be used in the collection of debts, and in securing them?

If this interpretation of the words should be too free for a judicial tribunal, yet if the legislature has made it, if congress has explained its own meaning too unequivocally to be mistaken, their courts may be justified in adopting that meaning.

The 22d section of the act of 1799, after directing the postmaster-general to sue for all balances due from his deputies, within six months after the expiration of the three months within which they ought to have been paid, enacts, "that all suits, which shall be hereafter commenced for the recovery of debts or balances due to the general post-office, whether they appear by bond or obligations made in the name of the existing or any preceding postmaster- [*151] general, * or otherwise, shall be instituted in the name of the postmaster-general of the United States."

These words follow immediately the clause which makes it the duty of the postmaster-general to sue for the money due from his

deputies, and are obviously applied to the moneys in their hands. They show the sense of the legislature, that this money may be a "debt," or a "balance," may "appear by bond or obligation," or otherwise, and are, we think, a legislative exposition of the words describing the power and duty of the postmaster-general in the superintendence of his department, and the means he may employ for collecting the money due from his deputies.

The 31st section of the same act repeals the previous laws for establishing the post-office department, after the first day of the ensuing May; and adds a proviso to the repealing clause, that, as to "all bonds, contracts, debts, demands, rights, penalties, or punishments, which have been made, have arisen, or have been incurred," &c., "the said acts shall have the same effect as if this act had not been made."

It is said by the counsel for the defendants that these words do not give efficacy to the bonds to which they refer, but leave them as they were anterior to the repealing act. This is true. But they explain the sense of the legislature, respecting the powers of the postmaster-general, and the manner in which he might execute those powers.

An additional proviso extends even to official bonds. After continuing the postmaster-general and all his deputies in office, it adds, "and also the bonds which they or either of them have or may give for the faithful execution of their several duties, shall continue to have the same force and effect, to all intents and purposes, after the first day of May next, as though this act had not been made."

This proviso, also, is no more than a recognition of the validity of those bonds; but it is a recognition of it, and goes the full extent of showing the legislative opinion that they might be taken. The act of 1810 repeals former acts, and contains the same provisions on this subject with the act of 1799.

The court has felt the pressure of this part of the case. *There is always difficulty in extending the operation of [*152] words beyond their plain import; but the cardinal rule of construction is, that where any doubt exists, the intent of the legislature, if it can be plainly perceived, ought to be pursued. It is also a rule that the whole law is to be taken together, and one part expounded by any other which may indicate the meaning annexed by the legislature itself to ambiguous phrases. The words describing the power and duty of the postmaster-general, may be expounded by other parts of the act showing the legislative opinion as to their extent; and if this be true, the sections which have been cited cannot be misunderstood. They show plainly that the legislature sup-

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posed it had given the postmaster-general authority to take these bonds.

A case cannot exist, in which effect may be given to the legislative intent more safely than in this. The bonds are taken in a case where no doubt can exist respecting the right and propriety of giving authority to take them; they are for money due to the United States; and the opinion of the legislature that authority was given, is expressed in as plain words as can be used. The acts of congress sustain the opinion that they have been taken with the knowledge and approbation of the legislature, from the first establishment of the offices; and provision is made by law for their being put in suit. The courts of the United States have, until very lately, uniformly given judgments on them.

Under these circumstances we think ourselves justified in continuing to sustain them, and to certify in this case, that the circuit court has jurisdiction of the cause.

1 P. 318; 10 P. 343.

JACKSON, *ex dem.* ST. JOHN, *v.* CHEW.

12 W. 153.

This court adopts the decisions of the highest court of a State settling a rule of construction of devises of lands.

In New York, a devise over to a survivor on failure of issue is deemed to be on a definite and not an indefinite failure of issue, and so is good by way of executory devise, and does not create an estate tail by implication, but a fee-simple, defeasible by death without issue in the lifetime of the survivor.

ERROR to the circuit court of the United States for the southern district of New York.

The question presented by the special verdict in this case, arose upon the will of Medcef Eden, the elder, bearing date the 29th day of August, 1798, by which will the testator devised to his son Joseph, certain portions of his real and personal property, among which were the premises in question in this cause, "to have and to hold the same to him, his heirs, executors, and administrators, forever." In like manner, he devised to his son Medcef, his heirs and assigns, certain other portions of his property; and, after making some other [*154] provisions, added the following clause: "Item. It is *my will, and I do order and appoint, that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor. And in case of both their deaths, without lawful issue, then I give all the property aforesaid to my brother, John Eden, of Loftus, in Cleveland, in Yorkshire, and my sister,

Hannah Johnson, of Whitby, in Yorkshire, and their heirs." And the question was what estate Joseph Eden, (under whom the lessor of the plaintiff claimed,) took in the premises in question. The testator died soon after making his will, leaving his two sons, Joseph and Medcef, living. Joseph died in August, 1812, without issue, leaving his brother Medcef alive. The lessor of the plaintiff claimed title derived from Joseph Eden, under the sale of the premises in question, by virtue of a judgment and execution against him, and sundry conveyances thereafter made of such title, as set out in the special verdict. The defendant claimed under a title derived from Medcef Eden, under the above-mentioned clause in his father's will, he having survived his brother. If Joseph Eden took an estate tail, it was, by operation of the statute of the State of New York abolishing entails, converted into a fee-simple absolute, and the subsequent limitation became inoperative. That statute, (passed the 23d of February, 1786,) declares: "That in all cases where any person would, if this act had not been passed, at any time hereafter become seised in fee tail of any lands, by virtue of any devise before made, or hereafter to be made, such person, instead of becoming seised thereof in fee-tail, shall be deemed and adjudged to become seised thereof in fee-simple absolute." So that if Joseph would have taken an estate tail under the will, if the act of 1786 had not been passed, by operation of the statute he became seised of an estate in fee-simple absolute, which was liable to be sold on the judgment against him, and the title under which the lessor claimed would be complete. But if Joseph took an estate in fee, defeasible in the event of his dying without issue, in the lifetime of his brother, (which event happened,) then Joseph's interest in the land became extinct on his death, and the limitation over to his brother Medcef was *good as an executory devise, and the defendant would [*155] consequently be entitled to judgment.

A judgment was entered upon the special verdict in the court below, for the defendant, *pro forma*, by consent of parties, for the purpose of bringing the cause before this court.

The *Attorney-General* and *D. B. Ogden*, for the plaintiff.

Webster and *Wheaton*, for the defendant.

*Thompson, J., delivered the opinion of the court, and, [*161] after stating the case, proceeded as follows:—

Questions growing out of devises of this description, are among the most difficult and intricate doctrines of the law; and from the numerous cases that have arisen, as found reported in the books, it

will be seen that nice and almost imperceptible distinctions have been resorted to, with the avowed object of carrying into effect the intention of the testator. To review the cases that have [*162] arisen in the *English courts on these questions, would be an arduous, and to reconcile them, a difficult, if not a fruitless undertaking. Nor are the decisions of the state courts in our own country in perfect harmony with each other. It is not deemed necessary, however, in the present case, to enter into an examination of these various decisions, either for the purpose of attempting to reconcile them, or to extract from them principles which might be applicable to the case now before the court, if the question was considered entirely an open question. The inquiry is very much narrowed, by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property, has been settled in the state courts, the same rule will be applied by this court that would be applied by the state tribunals.

This is a principle so obviously just, and so indispensably necessary, under our system of government, that it cannot be lost sight of.

The inquiry, then, is, whether the question arising in this case, has been so settled in the state courts of New York, as to be considered at rest there. Numerous cases have come before those courts upon this question; some on the very clause in the will now under consideration; others on wills containing clauses very analogous, and which, in those courts at least, have been considered identical with the present.

I shall proceed to notice some of the leading cases there decided, to see how the law on this question is held to have been settled in that State. In the case of Anderson *v.* Jackson, 16 Johns. 382, decided in the court for the trial of impeachments and correction of errors, in the year 1819, the decision turned solely upon the construction of this very clause in the will of Medcef Eden, the elder, affirming the judgment of the supreme court, which had been given without argument, the court considering the question raised to have been settled by former cases; and the court of errors, in affirming the judgment of the supreme court, put it principally upon the same ground, and considered the question at rest by the repeated and uniform decisions of the supreme court for the last twelve or fourteen years. It may be useful to recur to the progress of these [*163] *decisions, to see the steady and uninterrupted course of the courts upon the question, and how firmly the principle has become ingrafted in the law of that State as a rule of landed property.

The first case that arose was that of Fosdick *v.* Cornell, 1 Johns. 440, in the year 1806. By the will there in question, the devise over was: "My mind and will is, that if any of my said sons, William, Jacob, Thomas, and John, or my daughter Mary, shall happen to die without heirs male of their own bodies, then that the lands shall return to the survivors, to be equally divided between them." And it was held by the court unanimously, that this clause did not create an estate tail, but was to take effect as an executory devise. In the case of Anderson *v.* Jackson, the doctrine of that case was considered applicable to the Eden will, and to govern its construction. And it was not pretended by the dissenting members of the court of errors, but that if the case of Fosdick *v.* Cornell was correctly decided, it would govern the case then before the court. And the whole strength of the argument in the very elaborate opinions given by the dissenting members, was applied to the purpose of endeavoring to show that the decisions in that case, and in those which rested upon it, had proceeded upon incorrect views of the law, as decided both in the English and American courts. Chancellor Kent here took occasion to announce his change of opinion on this question, and to say that, although he did not deliver the opinion of the court, he would not shelter himself under his silence, but partook of the error; but that he had discovered, years ago, that the case of Fosdick *v.* Cornell was decided on mistaken grounds. If this should be admitted, (which I certainly do not mean to admit,) it is an error which has been so repeatedly sanctioned by all the courts of that State, for the last twenty years, that it has ripened into a settled rule of law. And a reference to the cases which followed that of Fosdick *v.* Cornell, will show that it has become a rule so fastened upon the law of real property in that State, as to make it unwise and unsafe to disturb it.

In the case of Jackson *v.* Blanshan, 3 Johns. 292, decided in the year 1808, the question before the court arose upon [* 164] a will, where the testator devised "all his estate, real and personal, to his six children, to be equally divided between them, share and share alike; but if any of them died before arriving at full age, or without lawful issue, that then his, her, or their part should devolve upon and be equally divided among the surviving children, and to their heirs and assigns, forever." This was held to be a good devise over by way of executory devise; and Chief Justice Kent, in delivering the opinion of the court, refers to the case of Fosdick *v.* Cornell, and observes that the court there reviewed the leading authorities, and held that the devise over was a good executory devise, and that the true construction was a devise over, to take

effect on failure of male issue during the life of the first taker That the ancient case of Hanbury *v.* Cockrill, 1 Roll. Abr. 835, was quite analogous in favor of the executory devise. The devise there was to the two sons in fee, with a proviso, that if either died before they should be married, or before they should attain the age of twenty-one years, and without issue of their bodies, then his share should go to the survivor. That Lord Kenyon, in the two cases of Porter *v.* Bradly, and Roe *v.* Jeffery, 3 Term Rep. 143; 7 Ib. 589, supported this established construction in a very forcible manner; and that the case before the court could not be distinguished in principle from those in which this rule of law is settled beyond controversy. Again; in the case of the Executors of Moffat *v.* Strong, 10 Johns. 12, decided in the year 1813, the testator, after giving certain specific parts of his real and personal estate to his sons, adds this provision: "And if any of my sons aforesaid should die without lawful issue, then let his or their part or parts be divided equally among the survivors." Although this was a case of personal property, the judgment of the court did not rest upon that distinction. Chief Justice Kent, in delivering the opinion of the court, says: "The greatest difficulty that arises in starting the main point for consideration, is to avoid being overwhelmed and confounded by the multitude of cases. Lord Thurlow said there were fifty-seven cases on this point, and we know they have greatly increased since." And, after reviewing many of the leading cases, the chief justice [*165] *observes, if the limitation rested solely on the words dying without issue, it would fail; but the will proceeds, and gives the part of the son so dying without issue to the survivors. The term survivors will be found to rescue the limitation from the operation of the general principle, and to bring it within the reach of other cases, which have adjudged that expression to be the cause of a different construction, and for the reason that it could not have been intended that the survivor was to take only after an indefinite failure of issue, as that event might happen long after the death of all the survivors. Thus stood the question when the chief justice was transferred to the court of chancery, no diversity of opinion having existed on the bench upon the question, according to the reported cases. The next case that came before the court was that of Jackson *v.* Staats, 11 Johns. 337, in the year 1814; and the construction of a similar clause in a will was under consideration. Spencer, J., in delivering the opinion of the court, observes, that "the point, whether the limitation over operates as an executory devise, or to create an estate tail, admits of very little difficulty. The case of Fosdick *v.* Cornell is in point, that this is a good executory devise;" and adds,

"I believe none of us have ever doubted the correctness of the decision in that case, and it would be a waste of time to review the authorities there cited." So that the law on this point was considered settled, and not open to argument, until it was again stirred, in the case of Anderson *v.* Jackson, 16 Johns. 382, in the court of errors, upon the clause in Eden's will, now under consideration; and the rule of construction settled in the supreme court, was considered applicable to this will, and governed the decision in the court of errors. Again, in the year 1823, the construction of this same clause in Eden's will came before the supreme court, in the case of Lion *v.* Burtis, 20 Johns. 483, and Spencer, Chief Justice, in delivering the opinion of the court, referred to the case of Anderson *v.* Jackson, in the court of errors, and said, it was there decided that the devise to Joseph Eden, did not create an estate tail, but that the devise over, upon the event of his dying without issue, was a limitation over as an executory devise to Medcef, the survivor. That the opinion * of the court was, that the devise over to the survivor did not depend on an indefinite failure of issue, but only on a failure of issue at the time of Joseph's death. "This, then," said the chief justice, "is the law of the land, and must govern every other case coming within the same principle. And I must be allowed to say, that subsequent reflection has confirmed my conviction of the soundness of the decision in the court of errors. *Stare decisis* is a maxim essential to the security of property. The decisions of courts of law become a rule for the regulation of the alienation and descent of real estate; and when that rule has been sanctioned and adopted in our courts, it ought to be adhered to, unless manifestly wrong and unjust." [* 166]

Other questions were, however, embraced in this case, and it was afterwards brought before the court of errors, 2 Cowen, 333, and a preliminary question was made, whether the court would hear an argument on the point decided in the case of Anderson *v.* Jackson. But as that question was so involved with other questions in the cause, it was found difficult entirely to separate them, and the argument proceeded; the president of the court at the same time observing, that he should suppose counsel would not question any point plainly decided in Anderson *v.* Jackson, both in its principle and object, and that he had no doubt the court would abide by its decision in that case. In the course of the argument, when the bearing of the case of Anderson *v.* Jackson was fully understood, it was proposed to stop the counsel, so far as the decision in that case was called in question; and the chancellor (Sanford) expressed his determination to adhere to that decision. That he understood it to fix

distinctly a construction upon the clause which devises to Joseph Eden, and was prepared to say it did not carry an estate tail, but a fee determinable on his death without issue then living. And although the counsel were allowed to proceed, and the question again fully argued, the court, when they came to pronounce judgment, disclaimed, in very strong language, any intention to call in question the decision of Anderson *v.* Jackson. Cramer, Senator, observes:

"The court has been called upon, in a very solemn manner, [*167] to review its decision on an important *rule of law affecting titles to real property. But we have not, in my view of the subject, the power, (and by power I mean right,) now to question or impeach that judgment rendered by this court, and founded on the uniform decisions of the supreme court during a period of more than seventeen years. Wills have been made, and estates settled, on the principle of these cases, which have been deemed and treated as the settled law of the land." And the judgment of the supreme court was unanimously affirmed, with the exception of one senator.

After such a settled course of decisions, and two of them in the highest court of law in the State, upon the very clause in the will now under consideration, deciding that Joseph Eden did not take an estate tail, a contrary decision by this court would present a conflict between the state courts and those of the United States, productive of incalculable mischief. If, after such an uninterrupted series of decisions for twenty years, this question is not at rest in New York, it is difficult to say when any question can be so considered. And it will be seen by reference to the decisions of this court, that, to establish a contrary doctrine here, would be repugnant to the principles which have always governed this court in like cases.

It has been urged, however, at the bar, that this court applies this principle only to state constructions of their own statutes. It is true that many of the cases in which this court has deemed itself bound to conform to state decisions, have arisen on the construction of statutes. But the same rule has been extended to other cases; and there can be no good reason assigned why it should not be, when it is applying settled rules of real property. This court adopts the state decisions, because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out of the common law, as the statute law of the State when applied to the title of lands. And such a course is indispensable, in order to preserve uniformity; otherwise, the peculiar constitution of the judicial tribunals of the States and of

the United States, would be productive of the greatest mischief and confusion.

*The case of M'Keen *v.* Delancy's Lessee, 5 C. 32, arose [*168] upon the construction of a statute. And the court say: "If the act then in question was for the first time to be construed, the opinion of the court would be, that the deed was not properly proved, and, therefore, not legally recorded. But in construing the statutes of a State, on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the State." And whether these rules of land titles grow out of the statutes of a State, or principles of the common law adopted and applied to such titles, can make no difference. There is the same necessity and fitness in preserving uniformity of decisions in the one case as in the other. So, also, in the cases of Polk's Lessee *v.* Wendal, 9 C. 98, and Thatcher *v.* Powell, 6 W. 127, the construction of state statutes respecting real property was under consideration; and the court say they will adopt and be governed by the state construction, when that is settled and can be ascertained, especially where the title to lands is in question. But in the case of Blight's Lessee *v.* Rochester, 7 W. 550, which arose in Kentucky, the question was not upon the construction of any statute, but related to the doctrine of estoppel, between vendor and vendee; and it was urged at the bar that the question was settled by authority in Kentucky, and cases cited to establish the point. The authorities were examined, and considered by the court as not deciding the question; but no intimation is given that they were inapplicable, because the question did not involve the construction of a statute. And the case of Daly *v.* James, 8 W. 535, which arose in Pennsylvania, is directly in point. The question there was upon the interpretation of a clause in a will, which had received a judicial construction by the supreme court of that State. And it was urged, as it has been here, that it was not one of those cases where the decisions of state courts, on questions of local law, established rules of property which this court could not disturb. But the court said they always listened with respect to the adjudications of the different States, when they apply. And in a question of so much doubt, they were *disposed, upon this [*169] point, to acquiesce in the decision of the supreme court of that State, Smith *v.* Folwell, 1 Binn. 546, that the word "heirs" in the will is to be construed to be a word of limitation.

In that case, this court adopted a single decision of the state court upon the question. But, in the case now under consideration, there have been two decisions, in the two highest courts of law in the

State, upon the identical question now in judgment, and which were in conformity to a settled course of adjudications for twenty years past.

After such a series of adjudications for such a length of time, in the state courts, upon the very point now before us, and relating to a rule of landed property in that State, we do not feel ourselves at liberty to treat it as an open question.

Judgment affirmed, with costs.

1 P. 570; 5 P. 151; 6 P. 291; 11 P. 1; 12 P. 410; 3 H. 464; 4 H. 353; 8 H. 495; 11 H. 297; 18 H. 497.

ARMSTRONG *v.* LEAR, Administrator, (with the will annexed,) of KOSCIUSZKO.

12 W. 169.

A testamentary paper executed in a foreign country, even if executed so as to give it the effect of a last will and testament by the foreign law, cannot be made the foundation of a suit for a legacy in the courts of this country, until it has received probate here, in the court having the peculiar jurisdiction of the probate of wills and other testamentary matters.

APPEAL from the circuit court for the District of Columbia.

The case is stated in the opinion of the court.

E. Livingston and *Wheaton*, for the appellant.

The *Attorney-General* and *Lear*, for the respondent.

STORY, J., delivered the opinion of the court.

The bill in this case is brought against the administrator, with the will annexed, of General Kosciuszko, for the purpose of establishing a right of the plaintiff to receive payment out of the assets of the testator, of a certain bequest to him, contained in a supposed testamentary writing, executed by the testator at Paris, in France, in June, 1806. This supposed testamentary writing is set forth in the bill, and averred to be in the nature and of the effect of a last will or writing testamentary; but it does not appear to have been admitted to probate, either in France, or in the proper orphan's court of this district. The answer admits the existence and authenticity of the instrument, and submits to the court its import and legal effect, and whether it is to be deemed a last will and testament; and it also admits assets in the hands of the administrator sufficient to discharge the bequest. The cause was heard in the court below, upon the bill and answer, and from the decree dismissing the bill the present appeal has been brought to this court.

The cause has been argued here upon several points, involving a

good deal of learning and some doctrines of international law. We do not enter into an examination of them, because our judgment proceeds upon a single point, and will, in no event, prejudice the merits of the plaintiff's claim.

By the common law, the exclusive right to entertain jurisdiction over wills of personal estate belongs to the ecclesiastical courts; and before any testamentary paper of personalty can be admitted in evidence, it must receive probate in those courts. Lord Kenyon, in The King *v.* Inhabitants of Netherseal, 4 Term Rep. 258, said: "We cannot receive any other evidence of there being a will in this case than such as would be sufficient in all other cases where *titles are derived under a will; and nothing but the pro- [*176] bate or letters of administration, with the will annexed, are legal evidence of the will, in all questions respecting personalty." This principle of the common law is supposed to be in force in Maryland, from which this part of the District of Columbia derives its jurisprudence; and the probate of wills of personalty to belong exclusively to the proper orphan court here, exercising ecclesiastical jurisdiction. If this be so, and nothing has been shown which leads us to a different conclusion, then it is indispensable to the plaintiff's title to procure, in the first instance, a regular probate of this testamentary paper, in the orphan's court of this district, and to set forth that fact in his bill. The treaty stipulations, the act of congress,[1] and the principles of the law of France, which have been cited at the argument, attributing to them the full force which that argument supposes to establish the validity of the instrument, do not change the forum which is entitled, by the local jurisprudence, to pronounce upon it as a testamentary paper, and to grant a probate. It is one thing to possess proofs, which may be sufficient to establish that a testamentary instrument had been executed in a foreign country, under circumstances which ought to give it legal effect here; and quite a different thing to ascertain what is the proper tribunal here by which those proofs may be examined, for the purpose of pronouncing a judicial sentence thereon.

For this reason, the decree of the court below is to be affirmed, but without prejudice, so that the instrument may be submitted to the decision of the proper probate court.

8 P. 52; 9 P. 174; 2 H. 619.

[1] 1 Stats. at Large, 254.

Justice, in 1 Term Rep. 731, that this was the sole object of that part of the statute of frauds which relates to this subject. In the case at bar, the judgment is notice to the purchaser of the prior lien, and there is no act of the legislature to protect the purchaser from that lien.

We think, then, that the deed made by the sheriff to the purchaser, under the first judgment, conveyed the legal title to the premises; and that the judgment on the special verdict ought to have been in favor of the plaintiff. *Judgment reversed.*

3 H. 292.

THE UNITED STATES *v.* TILLOTSON and another.

12 W. 180.

When a matter of fact necessary to a defence is controverted, it is error to direct the jury that the matters produced in evidence are sufficient to bar the action, and the jury ought to find for the defendant; for this instruction withdraws the fact from the jury.

THIS cause was argued by the *Attorney-General* and *Coxe*, for the plaintiffs, and *Webster* and *Wheaton*, for the defendants.

STORY, J., delivered the opinion of the court.

This cause comes before us from the circuit court for the southern district of New York, as upon a bill of exceptions taken to
[*181] *the opinion of the court, upon a trial before a jury, upon the matters in issue. In reality, no such trial was had; but the case assumed this shape by the agreement of the parties, in order to have the opinion of the court upon certain questions of law. We must, however, consider the case exclusively upon principles applicable to it as a bill of exceptions taken at a real trial.

Upon the argument in this court, various important questions have been elaborately discussed by counsel, upon which we forbear to express any opinion, as our judgment of reversal proceeds upon a ground which renders any decision on them unnecessary.

The bill of exceptions admits the due executions of the bond in controversy, and the breaches stated in the declaration are answered by special notices of defence set up as bars to the suit. The burden of proof of these defences, in point of fact, rested on the defendants. The court is supposed to have charged the jury that the matters produced and read in evidence on the part of the defendants, were sufficient in law to maintain the issue on their part, and that the jury ought to render their verdict in favor of the defendants. This charge can be maintained in point of law only upon the supposition that the evidence presented no contested facts; for otherwise it would with-

draw from the jury their proper functions, to determine the facts upon the evidence in the cause.

Upon examining the record, we think that there is contradictory evidence, or rather evidence conducing to opposite results, in respect to a point material to many of the specifications of defence, and particularly as to the matters in the third, fifth, sixth, seventh, eighth, and ninth. It is this, whether the contract of the 7th of June, 1820, between Col. Gadsden, as agent of the war department, and Samuel Hawkins, was ever a consummated agreement, binding on the United States, in virtue of an original authority given to him, *or was a preliminary agreement dependent for its [*182] validity upon the ratification of the war department; and if that was withheld, (which there was direct evidence to prove,) the agreement was a mere nullity. The bill of exceptions does not in terms find that the agreement was such a consummated agreement. It merely states that "on or about the 7th of June, 1820, Col. James Gadsden, then acting as the agent for fortifications at Mobile Point, and thereto duly authorized by the said war department, did enter into an agreement or contract with the said Samuel Hawkins, touching the foregoing contract with the said Benjamin W. Hopkins, and the erection of the fort therein provided for," &c. The word "thereto" may be applied either to the next antecedent, the agency of fortifications, or to the subsequent clause, stating the agreement. It may mean, having a due authority as agent for fortifications, or having a due authority to enter into the agreement. The recital in the agreement itself, that Col. Gadsden entered into it "in pursuance of the instructions of the secretary of the war department," would not be decisive of the point, supposing it to be entitled to the fullest weight as matter of recital. But the case does not rest here; in another part of the record, evidence is introduced on the part of the United States, to establish that the agreement so made had never been ratified on the part of the war department; and also to show that it was understood by that department, that without such ratification the contract was not obligatory. We allude to that part of the record where it is stated that the agreement, as soon as executed at Mobile Point, was transmitted to the war department, and that a letter was written by the authority of that department, under date of the 10th July, 1820, to the defendants, as Hawkins's sureties, inclosing a copy of the agreement, and requesting them, if they would sanction it, to send certificates of the fact, and "signify their approval, and authorize it to be carried into effect;" and it is added, "should you object, the contract will be carried on as before," that is, the original contract. It is further found by the case, that the agreement

"was not ratified by the secretary of war, nor ever acted
[*183] upon, except so far as it may appear to have *been ratified and acted upon by the said transcript" (of the treasury accounts) contained in the record.

It appears to us that, taking this evidence together, it was not a conceded point, but a matter of controversy between the parties, whether the agreement was obligatory upon the United States, and had become absolute by the assent of all the persons who had authority to perfect the same. This being so, it was a matter of fact to be decided by the jury, and the charge of the court was erroneous in withdrawing it from the consideration of the jury.

For this reason it is our opinion, that the judgment of the circuit court was erroneous, and ought to be reversed, and the cause be remanded, with directions to award a *venire facias de novo*. See 1 Paine's Rep. 305, S. C.

THORNTON, Plaintiff in Error, *v.* WYNN, Defendant in Error.

12 W. 183.

If an indorser who has not been duly notified unconditionally promise to pay the note, with a knowledge of all material facts, it is not necessary to prove notice or demand; but saying he knew the maker had not paid it, and was not to pay it, that it belonged to himself alone to pay it, is not sufficient, unless the indorser knew there had been no demand and that so he was discharged.

Breach of warranty, without an offer to return the property and rescind the contract, is not a defence to an action on a note given for the price of a chattel.

[*184] *This cause was argued by *C. C. Lee*, for the plaintiff in error, and by *Worthington*, for the defendant in error.

WASHINGTON, J., delivered the opinion of the court.

This was an action brought by the defendant in error, against the plaintiff in error, in the circuit court for the District of Columbia and county of Washington, upon a promissory note given by one Miller to Thornton, and by him indorsed to Wynn. The declaration contains a count upon the note, and also the common counts for money laid out and expended, and for money had and received.

At the trial of the cause upon the general issue, the defendant below took two exceptions to the opinion of the court, which are to the following effect. The first states that the plaintiff gave in evidence the note and indorsement mentioned in the declaration, and in order to dispense with the proof of the ordinary steps of diligence in presenting and demanding the note of the drawer, and giving notice to the indorser, the plaintiff offered evidence to prove that, a few weeks before the institution of this suit, the note in question was presented to the defendant, who, being informed that Miller, the

drawer, had not paid the note, said, "he knew Miller had not, and that Miller was not to pay it; that it was the concern of the defendant alone, and Miller had nothing to do with it; that the note had been given for part of the purchase-money of a certain race-horse called Ratler, and that the defendant offered to take up the said note if the plaintiff's agent would give time, and receive other notes mentioned in payment;" to the admission and competency of which evidence the defendant objected; but the court overruled the objection, and * admitted the evidence as competent to [*185] support this action, without any further proof of demand upon the drawer or notice to the indorser.

That the said evidence being so admitted by the court, the defendant offered evidence to prove that the said note was given for part of the purchase-money of the said race-horse, then celebrated for his performances on the turf, sold by the plaintiff to the defendant, and the said Miller, the drawer of the note, for $3,000, of which $2,000 had been paid; that the plaintiff, at the time of so selling this horse, warranted him sound, and declared him capable of beating any horse in the United States, and recommended the purchasers to match him against a celebrated race-horse in New York called Eclipse; that he also gave a representation of his pedigree, which he described as unexceptionable, and promised to procure his pedigree and send it to the defendant. And the defendant then offered evidence to prove that the said horse, at the time of the said sale, was utterly unsound, and broken down, and had been broken down whilst in the plaintiff's possession, and was reputed and proven by persons in the neighborhood of the plaintiff, who afterwards communicated the same to the purchaser; and was wholly unfit for and incapable of the action and fatigue necessary to a race-horse; and that the plaintiff had wholly failed to procure and furnish the pedigree of the horse, as he had agreed, and that a pedigree was an essential term in the purchase of the horse, or ordinarily is so in the purchase of such horses, without which this horse was worth nothing; and that the said Miller, as soon as it had been ascertained by repeated trials that the horse was incurably unsound, offered to return him to the plaintiff, who refused to take him back, although the former offered to lose what he had already paid for the horse, which offer was made after the note fell due. Whereupon the court instructed the jury, at the prayer of the plaintiff, that if they should be of opinion, from the said evidence, that the said horse was, at the time of the said sale, utterly unsound and broken down, and had been broken down whilst in the plaintiff's possession, and was wholly unfit for and incapable of the action and fatigue necessary * to a race-horse, but that the [*186]

said facts were not known to the plaintiff at the time of the said sale, the said facts are not a sufficient defence in this action to prevent the plaintiff from recovering.

Upon these instructions of the court, the jury found a verdict for the plaintiff, and the cause now comes before this court upon a writ of error.

This bill of exceptions presents two questions for the decision of this court. The first is, whether the evidence offered by the plaintiff, and admitted by the court, dispensed with the necessity of proving a demand of payment of the maker of the note, and due notice to Thornton of non-payment; and, secondly, whether the court below erred or not, in stating to the jury that the alleged breach of the warranty of the horse, if proved to their satisfaction, was not a sufficient defence in this action to prevent the plaintiff from recovering, unless the facts stated in the bill of exceptions were known to the plaintiff at the time of the sale.

In the argument of the first question, the counsel on both sides considered the evidence offered by the plaintiff as presenting a double aspect. 1. As authorizing a conclusion, in point of fact, that the note of hand on which the suit is brought, was made and passed to Thornton without consideration, and merely for his accommodation; and, 2. As amounting to a promise to pay the note, or at least to an admission by Thornton of his liability to pay it, and of the right of the plaintiff to resort to him, whether it was made solely for his accommodation, or was given for value in the ordinary course of trade.

As to the first, the counsel treated the note throughout as an accommodation note, and submitted to the decision of this court the question, whether the indorser of such a note was entitled to call for proof of a demand of payment of the maker, and notice to himself?

Whether this question was ever raised in the court below, or in what manner it was there treated, does not appear from the bill of exceptions. It is possible that that court may have intended nothing more by their direction to the jury, than to sanction the admissibility of the evidence, and its sufficiency to authorize a verdict [* 187] for the plaintiff, *without other proof of demand and notice, provided the jury should be of opinion that it warranted the conclusion that the note was given without consideration. But such is not the language of the court, as stated in the bill of exceptions. The jury were informed that the evidence was competent to support the action without such further proof of demand and notice, without leaving the inference of fact that the note was given without consideration to be drawn by the jury. Had the court distinctly stated to

the jury that this was such a note, and, therefore, that further proof of demand and notice was unnecessary, the incorrectness of the direction could have been doubted by no person, since the court would, in that case, have inferred a fact from the evidence, which it was competent to the jury alone to do. And yet it seems difficult to distinguish the supposed case from the one really presented by the bill of exceptions, upon the hypothesis that the court below decided any thing as to the particular character of this note, since it is very obvious, that no question of fact was submitted to the consideration of the jury. It is, therefore, due from this court to the one whose decision we are revising, to conclude that that decision did not proceed upon the assumption that this was a note drawn for the accommodation of the indorser.

It remains to be considered whether the direction was correct upon the other aspect of the evidence.

It is now well settled, as a principle of the law merchant, that an unconditional promise, by the drawer or indorser of a bill, to pay it, after full knowledge of all the circumstances necessary to apprise him of his discharge from his responsibility by the laches of the holder, amounts to an implied waiver of due notice of a demand of the drawer or acceptor, and dispenses with the necessity of proving it. Such are the cases of Borradaile *v.* Lowe, 4 Taunt. 93; Donaldson *v.* Means, 4 D. 109, and others, which need not be cited. So if, with the knowledge of these circumstances, he answer, that the bill "must be paid;" "that, when he comes to town, he would set the matter right;" "that his affairs were then deranged, but that he would be glad to pay it as soon as his accounts with his agents were settled;" or, "that he would see it paid;" or if he pay a part of the bill; in all *these cases it has been decided, [*188] that proof of regular notice is dispensed with. 2 Term Rep. 713; Bull. N. P. 276; 2 Campb. 188; 6 East, 16; 2 Stra. 1246.

The principle upon which these decisions proceed is explained in many of the above cases, and particularly in that of Rogers *v.* Stevens, 2 Term Rep. 713. It is this: that these declarations and acts amount to an admission of the party, that the holder has a right to resort to him on the bill, and that he had received no damage for want of notice. See, also, Stark. Evid. 272.

The same principle applies with equal force to promissory notes, which, after indorsement, partake of the character of bills of exchange; the indorser being likened to the drawer, and the maker to the acceptor of a bill. The case of Leffingwell and Pierpoint *v.* White, 1 Johns. Cas. 99, is that of a promissory note, where the

indorser, before it became due, stated that the maker had absconded, and that, being secured, he would give a new note, and requested time. The court say that the defendant had admitted his responsibility, treated the note as his own, and negotiated for further time for payment; by which conduct he had waived the necessity of demand of the maker, and notice to himself. Taylor *v.* Jones, 2 Campb. 105; Vaughan *v.* Fuller, 2 Stra. 1246; and Anson *v.* Bailey, Bull. N. P. 276, were all cases of actions on promissory notes against the indorser. In this case, the defendant below, upon being informed that Miller, the maker of the note, had not paid it, observed that he knew he had not, and that he was not to pay it; that it was the concern of the defendant alone, and that Miller had nothing to do with it, it having been given for part of the purchase-money of a horse. These declarations amounted to an unequivocal admission of the original liability of the defendant to pay the note, and nothing more. It does not necessarily admit the right of the holder to resort to him on the note, and that he had received no damage from the want of notice, unless the jury, to whom the conclusion of the fact from the evidence ought to have been submitted, were satisfied that the defendant was also apprised of the laches of the holder, in not making a regular demand of payment of [* 189] the note, by which he was * discharged from his responsibility to pay it. The knowledge of this fact formed an indispensable part of the plaintiff's case, since without it, it cannot fairly be inferred that the defendant intended to admit the right of the plaintiff to resort to him, if, in point of fact, he had been guilty of such laches as would discharge him in point of law. For any thing that appeared to the court below, from the evidence stated in the bill of exceptions, the admissions of the defendant may have been made upon the presumption that the holder had done all that the law required of him, in order to charge the indorser. That due notice was not given to the defendant, he could not fail to know; but that a regular demand of the maker of the note could not be inferred by the court from the admissions of the defendant.

For the reasons above stated, the judgment of the court below must be reversed, and the cause remanded for a new trial.

But since the second question before mentioned has been distinctly brought to the notice of this court, has been fully argued, and must again be decided by the court below, it becomes necessary that this court should pass an opinion upon it. That question is, whether the alleged breach of the warranty of the horse, the price of which formed part of the consideration of the note, if proved to the satis-

faction of the jury, was a sufficient defence in this action to prevent the plaintiff from recovering, unless the facts stated in the bill of exceptions were known to the plaintiff below at the time of the sale.

The question is, not whether the purchaser of a horse, which is warranted sound, has a remedy over against the vendor, upon the warranty, in case it be broken, but whether, in an action against him for the purchase-money, he can be permitted to defend himself by proving a breach of the warranty?

The cases upon this subject are principally those where the vendee, having executed the contract on his part, by paying the purchase-money, brought an action of *indebitatus assumpsit* against the vendor, as for money had and received to his use. But it is perfectly clear that the reasoning of the court in those cases applies with equal force to * a case where the breach of the warranty is [* 190] set up by the vendee as a defence against an action against him to recover the purchase-money.

The first case we meet with on this subject is that of Power *v.* Wells, of which a very imperfect report is to be seen in a short note in Dougl. 24, and in Cowp. 818. There, the plaintiff gave a horse and twenty guineas to the defendant for another horse, which he warranted to be sound, but which proved otherwise. The plaintiff offered to return the horse, which was refused; and the plaintiff brought two actions, one for money had and received, to recover back the twenty guineas which he had paid, and an action of trover for the horse, possession of which the plaintiff had delivered to the defendant. The court decided that neither action could be maintained; not the second, because the property had been changed. This case was referred to, by the judge who had decided it, at *nisi prius*, in the case of Weston *v.* Downes, Dougl. 23, which soon after came before the court of king's bench. That was an action for money had and received; and the case was, that the plaintiff had paid a certain sum to the defendant for a pair of horses, which the defendant agreed, at the time, to take back, if they were disapproved of and returned within a month. They were returned, accordingly, within the stipulated period, and another pair was sent in their stead, without any new agreement. These were likewise returned, and accepted by the vendor, and a third pair were sent, which, being likewise offered to be returned, the vendor refused to take them back. Lord Mansfield was against the action; because, the contract being a special one, the defendant ought to have notice by the declaration that he was sued upon it. Ashhurst, J., was of the same opinion; but added, that if the plaintiff had demanded his money on the return of the first pair of horses, this action would have lain, but

that the contract was continued; from which expression nothing more is understood to have been meant than that the contract remained open. The ground upon which Buller, J., thought that the action could not be maintained was, that, by refusing to take back the horses, the defendant had not precluded himself from
[*191] entering into *the nature of the contract; and that, whenever that is open, it must be stated specially.

The meaning of these latter expressions is distinctly stated by the court, and particularly by this judge, in the case of Towers *v.* Barrett, 1 Term Rep. 133, which followed next in order of time; that was also an action for money had and received. The money was paid for a horse and chaise, to be returned in case the plaintiff's wife should not approve of them. They were accordingly sent back to the defendant in three days after the sale, and left on his premises against his consent to receive them.

Lord Mansfield, C. J., and Willis, J., distinguish this case from that of Weston *v.* Downes, upon the ground that that was an absolute, and this a conditional agreement, which was at an end by the return of the horse and chaise, and was no longer open. Both the judges treat the case as if the vendor had taken back the property, although, in fact, he had not consented to do so. Ashhurst, J., was of opinion that this case would have resembled that of Weston *v.* Downes, if, in that, the plaintiff had returned the horses. It is very clear, from what was said by the same judge in that case, that his meaning in this was if the plaintiff had returned the first pair of horses, and then demanded his money; for, he adds, that in that case there was an end of the first contract by the plaintiff's taking other pairs, and this constituted a new contract, not made on the terms of the first. But in this case the contract was conditional, and when the horse and chaise were returned, the contract was at an end, and the defendant held the money against conscience. Buller, J., is still more explicit. He says that the defendant, by the contract, had put it in the power of the plaintiff to terminate it, by returning the horse and chaise, and that the plaintiff had no option to refuse to take them back; and that, being bound to receive them, the case was the same as if he had actually accepted them. He adds that the distinction between those cases where the contract is open, and where it is not, is, that if it be rescinded, either by the original terms of the contract, as in this case, where no act remains to be done by the defendant, or by a subsequent assent by him, the plaintiff may recover
[*192] back his whole *money, and then this action will lie. But if it be open, the plaintiff's demand is only for damages arising out of the contract.

The court proceeded upon this distinction, in deciding the case of Payne *v.* Whale, 7 East, 274, which followed the one just noticed. The action was to recover back money paid to the defendant for a horse sold by him to the plaintiff, which he warranted sound. The plaintiff offered to return the horse, upon an allegation of his unsoundness, which the defendant denied and refused to take him back; but agreed that, if he was in fact unsound, he would take him back and return the purchase-money. The unsoundness was proved at the trial; but the court was of opinion that the action could not be supported, and distinguished this case from the preceding one by observing, that in that the plaintiff had an option, by the original contract, to rescind it on a certain event; but here it was no part of the original contract that the horse was to be taken back; and that the subsequent promise amounted to no more than that he would take him back if the warranty were shown to be broken, which still left the question of warranty open for discussion, and then the form of the action ought to give the defendant notice of it by being brought upon the warranty.

The case of Lewis *v.* Cosgrave, 2 Taunt. 2, was precisely like the present, in which the same distinction and the same principles were recognized by the judge who tried the cause at *nisi prius*. It was an action on a bill drawn for the price of a horse, which, on the sale of him, was warranted sound, but turned out not to be so. The defendant offered to return the horse, which was refused, and the defendant left him in the plaintiff's stable without his knowledge. The judge decided that, as the plaintiff had refused to take back the horse, the contract of sale was not rescinded, and, consequently, that the defendant must pay the bill, and take his remedy by action for the deceit. But upon a rule to show cause why a new trial should not be granted, the court said that it was clear the plaintiff knew of the unsoundness of the horse, which was clearly a fraud, and that no man can recover the price of an article sold under a
*fraud. See also the cases of Fortune *v.* Lingham, 2 [*193] Campb. 416, and Solomon *v.* Turner, 1 Stark. 51.

The result of the above cases is this: if, upon a sale with a warranty, or if, by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and, in that case, the contract is rescinded and at an end, which is a sufficient defence to an action brought by the vendor for the purchase-money, or to enable the vendee to maintain an action for money had and received in case the purchase-money has been paid. The consequences are the same where the sale is absolute, and the vendor afterwards consents, un-

conditionally, to take back the property; because, in both, the contract is rescinded by the agreement of the parties, and the vendee is well entitled to retain the purchase-money in the one case, or to recover it back in the other. But if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time. We are, therefore, of opinion that the direction of the court in this case, upon the second exception was entirely correct. The judgment is to be reversed, and the cause remanded to the court below for a new trial.

12 P. 497; 9 H. 213.

MALLOW and others *v.* HINDE.

12 W. 193.

Though the rules as to parties in equity are somewhat flexible, yet where the court can make no decree, between the parties before it, upon their own rights, which are independent of the rights of those not before it, it will not act.

[* 194] * THIS cause was argued by *Bond* and *Brush*, for the appellants, and by *Doddridge* and *Scott*, for the respondents.

TRIMBLE, J., delivered the opinion of the court.

This is an appeal from the decree of the circuit court for the district of Ohio, dismissing generally, with costs, the bill of the appellants, who were plaintiffs in that court.

The suit was a contest for land in the district, set apart on the northwest side of the Ohio, for the satisfaction of the bounty lands due to the officers and soldiers of the Virginia line, or continental establishment, in the revolutionary war.

The plaintiffs set up claim to the land by virtue and under a survey No. 537, in the name of John Campbell. It appears that John Campbell, before his death, made his last will and testament, whereby he devised his land warrants, entries, and surveys, in the military district, to Col. Richard Taylor and others, his executors, in trust for the children of the testator's sister, Sarah Beard; and that Taylor alone qualified as executor, and took upon himself the trust. Taylor never conveyed or assigned the warrants, entries, or surveys, to Mrs. Beard's children, but permitted them, as the bill charges, to take the management of them into their own hands.

Elias Langham made sundry executory contracts with Mrs. Beard's children, after they arrived at full age, which contracts

are set out in the bill, whereby, as the complainants allege, Langham became equitably entitled to survey [*195] No. 537; and afterwards sold, and made deeds of conveyance for the land to the complainants; who, in consequence of their purchases from Langham, took possession of, and improved the land.

Thomas S. Hinde having purchased and procured an assignment of a military warrant from Col. Richard Taylor, and belonging to him in his own right, made an entry thereof in Hinde's own name, in the principal surveyor's office; and having caused a survey to be made thereupon, covering survey No. 537, in the name of Campbell, Hinde obtained a patent for the land from the government.

Being thus clothed with the legal title, Hinde instituted actions of ejectment in the circuit court against the appellants, and obtained judgments of eviction against them.

They filed their bill, praying for an injunction against the judgments at law; and also praying that Hinde should be decreed to release and convey to them his legal title, and for general relief.

The bill charges that Col. Richard Taylor, with full notice that the appellants were, in virtue of Langham's contract with the *cestuis que trust*, and Langham's sale to them, equitably entitled to, and in possession of, survey No. 537, fraudulently combined with Hinde and others, and improperly and without authority withdrew the entry on which survey No. 537 had been made, and reëntered and caused it to be surveyed elsewhere; and that Hinde, availing himself of such improper and unauthorized withdrawal, had entered, surveyed, and patented the land in his own name, he also having notice of all the circumstances attending the claim of the appellants; and that Taylor and the Beards refuse to perfect the survey by obtaining a patent, and refuse to convey or transfer it to the appellants.

The bill also alleges that Langham had become equitably and legally entitled to the survey No. 537, as a purchaser thereof, for taxes due thereon to the State of Ohio.

Hinde filed his answer, in which he denies the charges of fraud and collusion; insists the land had become vacant by the withdrawing of the entry in the name of Campbell, and by surveying it elsewhere; and that he had legally appropriated it by his entry, [*196] survey, and grant; he neither admits nor denies the execution of the contracts alleged between Langham and the Beards, and puts the complainants upon proof; and he further insists that such contracts, if made, conferred upon Langham no equitable title; first, because the Beards had no power to sell, without the concurrence of Taylor, the trustee; and, secondly, because Langham had obtained the contracts by fraud, and had not paid the consideration stipulated.

Neither Taylor, the trustee, nor the *cestuis que trust*, with whom the complainants allege Langham contracted for the land, are made defendants, they being out of the limits of the jurisdiction of the court.

No attempt has been made in the argument to support the validity of the tax sale, and it may be laid out of the case.

For the appellees, it is insisted that the proper parties are not before the court, so as to enable the court to decree upon the merits of the conflicting claims. And we are all of that opinion. It is plain that the appellants cannot set up the survey No. 537, against the appellee's title, without first showing themselves entitled to that survey. They claim that survey, not by any assignment, or other instrument, investing them with a legal right to it, but by executory agreements, the validity and obligation of which the parties to them have a right to contest.

We cannot try their validity, and decide upon their efficacy, by affirming they confer upon the appellants an equitable right, without manifest prejudice to the rights of those not before the court. The complainants can derive no claim in equity to the survey, under, or through Langham's executory contracts with the Beards, unless these contracts be such as ought to be decreed against them specifically, by a court of equity. How can a court of equity decide that these contracts ought to be specifically decreed, without hearing the parties to them? Such a proceeding would be contrary to all the rules which govern courts of equity, and against the principles of natural justice. Taylor, too, is the legal proprietor of the warrant, by virtue of which the entry and survey No. 537 was made, and in general the right of removal is incidental to the right of property. But it is al-
[* 197] leged * he has parted with that incidental right, although the general legal title of ownership remains in him; or that he has exercised this incidental right fraudulently and improperly, to the prejudice of the appellants.

Can any court justly strip him of this incidental right, or convict him of fraud unheard? Besides, if the court should, by its decree, compel Hinde to release his legal title to the complainants, upon the grounds that the entry and survey No. 537 are superior to his title, it would be giving to the complainants that which belongs to Taylor as trustee, and to his *cestuis que trust*, unless by their acts and agreements they have parted with their right to the survey. If the courts of the United States were courts of general jurisdiction, it could not be doubted that Taylor, William, and Joseph Beard, and Mr. M'Gowan and wife, would be necessary and indispensable parties, without whom no decree upon the merits could be made. But it is con-

tended that the rule which prevails in courts of equity generally, that all the parties in interest shall be brought before the court, that the matter in controversy may be finally settled, ought not to be adopted by the courts of the United States; because, from the peculiar structure of their limited jurisdiction over persons, the application of the rule in its full extent would often oust the court of its acknowledged jurisdiction over the persons and subject before it.

It is true this equitable rule is framed by the court of equity itself, and is subject to its sound discretion. It is not, like the description of parties, an inflexible rule, the failure to observe which turns the party out of court, merely because it has no jurisdiction over his cause; but being introduced for the purposes of justice, is susceptible of considerable modifications for the promotion of these purposes. Accordingly, this court, in the case of Elmendorf *v.* Taylor, 10 Wheat. 167, has said: "That the rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the courts of the United States, is not applicable to all. In the exercise of its discretion, the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But if the case may * be completely decided, as between the litigant [*198] parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such party be the resident of some other State, ought not to prevent a decree upon its merits."

This doctrine was applied to the case where a small interest was outstanding in one not before the court, as tenant in common.

In that case, the right of the party before the court did not depend upon the right of the party not before the court; each of their rights stood upon its own independent basis; and the ground upon which it was necessary, according to the general principle, to have both before the court, was to avoid multiplicity of suits, and to have the whole matter settled at once.

In this case, the complainants have no rights separable from and independent of the rights of persons not made parties. The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties.

We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground that no court can adjudicate directly upon a per-

son's right, without the party being either actually or constructively before the court.

We have no doubt the circuit court had jurisdiction between the complainants and the defendant, Hinde, so far as to entertain the bill, and grant an injunction against the judgments at law, until the matter could be heard in equity.

And if it had been shown to the circuit court that, from the incapacity of that court to bring all the necessary parties before it, that court could not decide finally the rights in contest, the court, in the exercise of a sound discretion, might have retained the cause and the injunction, on the application of the complainants, until they had reasonable time to litigate the matters of controversy between them and Taylor and the Beards, in the courts of the State, or [*199] *such other courts as had jurisdiction over them; and if then it was made to appear by the judgment of a competent tribunal, that the complainants were equitably interested with the rights of Taylor, the trustee, and the *cestuis que trust* in the survey No. 537, the circuit court could have proceeded to decree upon the merits of the conflicting surveys.

Such a proceeding would seem to be justified by the urgent necessity of the case, in order to prevent a failure of justice; and the cause would have remained under the control of the circuit court, so as to have enabled it to prevent unreasonable delay, by the negligence or design of the parties, in litigating their rights before some competent tribunal.

The cause having been brought to a hearing before the circuit court, in its present imperfect state of preparation, that court could not do otherwise than dismiss the bill; but as no final decision of the rights of parties could properly be made, the dismission, instead of being general, ought to have been without prejudice. So much of the decree as dismisses the bill generally must be reversed, and the decree, in all things else, affirmed; and the cause is to be remanded to the circuit court, with directions to dismiss the bill without prejudice.

1 P. 241; 13 P. 359; 17 H. 130.

CONNOR and others Appellants, *v.* FEATHERSTONE and others, Respondents.

12 W. 199.

A question of fact upon a bill filed to set aside the sale and assignment of a land warrant. Evidence deemed insufficient and bill dismissed.

THIS cause was argued by *White*, for the appellants, and by *Isaacks*, for the respondents.

*TRIMBLE, J., delivered the opinion of the court. [*200]

This case comes before the court, by appeal from the decree of the circuit court for the western district of Tennessee.

The bill was instituted by James Hibbits in his lifetime, and after his death the suit was revived in the names of the appellees, his heirs at law, after which the defendants, now appellants, appeared and answered.

The object of the suit was to have delivered up to the complainant a land warrant of 5,000 acres, which had been issued in the name of James Hibbits, upon an entry made by him in John Armstrong's office, No. 394, and to restrain James and Henry W. M. Connor, and each of them, from procuring a grant upon a survey which had been made and returned for the use of James Connor, by virtue of the warrant, under color of certain assignments alleged by James and Henry Connor to have been made by Hibbits, and to have those assignments set aside.

It appears that James Connor held a writing under seal, dated the 25th of September, 1796, purporting to be signed and executed by James Hibbits, to the following effect: "I, James Hibbits, of the county of Iredell, and State of North Carolina, for and in consideration of the sum of £93 10*s*., of the State aforesaid, have granted, bargained, and sold to James Connor, of Mecklenburgh county, and State aforesaid, a 5,000 acre warrant, entered in Colonel John Armstrong's office, No. 394, and I do authorize Colonel William Polke, or any of his deputies, or any other surveyor, to issue the returns, when the land is surveyed, in the name of James Connor."

The execution of this assignment is contested by the bill, which suggests that a mere order for the delivery of the warrant was given, without any terms of transfer; but its due execution is expressly averred by the answer, and clearly sustained by evidence.

It appears, from the statements of the bill and answer of James Connor, that, although this assignment purports to be general and absolute, there was a parol agreement and understanding between the parties at the time of its execution, qualifying its general import. But the parties *differ very materially as [*201] to the character and extent of this parol agreement. Both admit that Hibbits was indebted to Connor a sum of money, which it was not convenient then to pay, but they differ as to its amount. Both agree that the sum so due from Hibbits to Connor, and Connor's agreement to pay to government a balance due upon the entry, of about £24, with the interest thereon due to the State, and for which the warrant was detained, was the considera-

tion of the assignment. Hibbits insists that by the agreement and understanding of the parties, the assignment was intended as a mortgage or security for the debt, together with the advance to be made to the government; but Connor, in his answer, expressly denies such was the character of the agreement, and insists it was that Connor should be proprietor of the warrant, so far as these sums would go, at the rate of £60 per thousand acres, and that the residue should be held by him in trust for Hibbits. It appears that Connor paid to the government £45 17*s.* and 4*d.*, the balance due upon the entry, with interest, and procured the warrant to issue and be delivered to him, on the 29th of November, 1797. It appears that the adjustment and settlement of their respective interests in the warrant, was the subject of occasional correspondence and negotiation between them, from that time until 1817; but that, as the land lay in the Indian country, and could not lawfully be surveyed until the Indian title should be extinguished by the general government, the matter lay over until that period.

It appears that in June, 1817, James Connor sent his son, Henry W. M. Connor, with a power of attorney and instructions, from North Carolina, to James Hibbits, in Tennessee, to adjust the business within, either by selling to Hibbits Connor's interest in the warrant, or purchasing Hibbits's interest in it. That on the day of June, 1817, at Hibbits's own house, a contract was made by Henry Connor, as agent of James Connor, with Hibbits, by which Hibbits agreed to transfer and assign to James Connor, or his agent, for his use, all Hibbits's interest in the warrant, for which Connor agreed to convey to Hibbits, by deeds with special war-
[* 202] ranty, Connor's right in two grants of 1,000 acres, *in Connor's name, calling to lie on Swift Creek; and also give a bond for the conveyance of 150 acres in Bedford county; in execution of which agreement an assignment of the whole warrant was accordingly executed by Hibbits, and deeds for the two grants of 1,000 acres each, on Swift Creek, and a bond for the 150 acres in Bedford county, were executed by Henry W. M. Connor, as agent for James Connor.

The bill charges that this assignment was procured by Henry W. M. Connor, "most fraudulently, and in the following manner": "That Hibbits was confined to his bed by a severe and long spell of sickness, under the influence of which he had labored several months; that his intellect and his faculties were so much debilitated and impaired, that he scarcely knew any thing he was doing; that Henry Connor represented all the lands he proposed giving for the warrant, as good and valuable lands; and he moreover represented that the

land called for in said warrant lay south of, and without the limits of the State of Tennessee; all of which assertions and allegations of said Henry were false, and known by him to be so at the time. He had been correctly informed that the land lay in this State, (Tennessee,) and that it was very valuable; he had been offered for part of it $6,00 per acre, and he also knew that the two tracts of 1,000 acres each on Swift Creek, had never been surveyed; and that the 150 acres in Bedford county had been taken by a better claim."

This is the substance of the charges of fraud and misrepresentation made in the bill, all of which are substantially denied by the answer.

At the hearing of the cause, the circuit court decreed that the assignment of the day of June, 1817, should be set aside and held for naught; that neither of the Connors should hold any interest in the warrant by virtue of that assignment, and then proceeded to direct what interest the parties should respectively hold in the warrant, under the assignment and contract of 1796, and directed a release of the proportion allotted by the decree to the complainants accordingly.

It is plain that if the assignment of 1817 ought not to be set aside, the decree must be considered not only erroneous, but there can be no necessity for inquiring what interest [*203] each party should hold in the warrant under the contract and assignment of 1796, independently of the assignment of 1817. That matter was adjusted by the contract and assignment of 1817; and unless that assignment should be set aside for fraud and imposition, we cannot go behind it.

It is argued that James Hibbits was so diseased in mind and body as to be incapable of controlling his own conduct, and that undue advantage was taken of his imbecility by Henry W. M. Connor. We do not think the allegation supported by sufficient proof. The answer denies it; and William Cawley is the only witness who speaks directly to the purpose. William Alexander swears he was once at Hibbits's house, in the summer of 1817; that Hibbits was in great agony, and then incapable of transacting business; but whether from the excess of bodily pain only, or conjointly from that and mental imbecility, he is silent. The former we think the fair and only import of his evidence, as he says nothing of the state of Hibbits's mind, but speaks expressly of bodily disease. Besides, it is uncertain whether this was before or after the contract; and cannot, therefore, furnish a circumstance in aid of Cawley's statements. Many other witnesses depose as to Hibbits's mental condition, whose statements are irreconcilable with Cawley's impressions. A letter written by

Henry W. M. Connor, to Adam Miller, in which he says: "Mr. Hibbits has found out that I made an advantageous trade with him, that the land was in the State of Tennessee, contrary to his expectation, and complains heavily that I took an advantage of him, that he was a little deranged at the time," is greatly relied on in argument, not only to prove Hibbits's insanity, but to prove Henry W. M. Connor misrepresented the situation of the entry of 5,000 acres, and thereby deceived and defrauded Hibbits.

So far as the letter alludes to the state of Hibbits's mind at the time of the contract, and to "an advantage" having been taken of him, the writer evidently means to state only Mr. Hibbits's subsequent complaints, and not the facts or circumstances actually attending the transaction. The letter cannot, then, prove that Hibbits was deranged, or that Connor took advantage of him, unless it [*204] is inferable from other parts *of the letter. He says, Hibbits had found out that Connor had made an advantageous trade; but it would be a very strained construction of this language, to suppose Connor meant any thing more by it than a good bargain.

He says, Hibbits had found out the land lay in Tennessee, contrary to his expectation; and it has been insisted in argument, that this fixes decisively upon Henry Connor the imputation of fraud and misrepresentation, as to the situation and value of the 5,000 acres of land. We do not think so. In the very doubtful state of the question, where the state boundary would run, when ascertained by public authority, the various conjectures and opinions then existing on the subject, the near proximity of the land to the line as afterwards established, no inference unfavorable to the fairness of Connor's conduct can justly be drawn from Hibbits's expectation, at the time of the contract, that the land was not in Tennessee, unless it were shown that Connor, by his representations, superinduced that expectation. There is nothing in the letter, and we can discover nothing elsewhere in the evidence, conducing to prove that Connor, at the time of the contract, made any representation on the subject of the land being without or within Tennessee.

In the existing state of circumstances, in relation to the position of the state line, which was not fixed or known until long after, it could at most be but matter of opinion or conjecture, whether the land would or would not fall within Tennessee. It is not shown that Henry W. M. Connor expressed even an opinion to Hibbits on the subject; and if Hibbits entertained an erroneous opinion, it would be going too far, in a matter apparently involved, at the time, in uncertainty, to hold Connor responsible for that error.

The bill charges Connor with falsely representing the value of the

5,000 acres; but that is also denied by the answer, and there is nc proof in support of the bill.

It is further argued that the deeds made by Connor to Hibbits for the two tracts of 1,000 acres each, calling to be on Swift Creek, being drawn by Henry W. M. Connor, and containing only a clause of special warranty, is evidence of the fraud and undue advantage taken of Hibbits's situation. The clause of warranty in the conveyances is to the following *effect, to wit: "That he, the [*205] said James Connor, for himself and heirs, shall and will warrant and defend the above-named grant from the lawful claim or claims of any person or persons whatever; but it is hereby understood that the said Henry W. M. Connor, as agent for James Connor, does not obligate himself to warrant the land called for in the grant, but only to warrant the grant itself from all legal claims of any person or persons."

Whatever singularity may, at first blush, appear in this clause of warranty, it vanishes when the state of the country and the titles in it are understood. The 5,000 acre entry of Hibbits, and the land given in exchange for it, in the contract of 1817, at that time all lay in the Indian country, and the Indian title thereon had not been extinguished. Although the warrant upon the 5,000 acre entry had issued, it had not been surveyed, and could not be lawfully surveyed until the Indian title should be extinguished by the general government. Although grants had issued for the two tracts of 1,000 acres each, calling to lie on Swift Creek, it was very probable that they had issued, as is understood to have been the case in many instances, without actual surveys having been executed on the grant. By the laws and usages of the State, as understood to exist at the time, duplicate warrants could be procured, and located on other lands, whenever it appeared the land granted could not be identified for want of a survey, or was lost by a superior interfering claim. In such a state of things, it was evidently a risking bargain on both sides; and the peculiar clause of warranty must be presumed to secure to Hibbits the benefit of procuring warrants for the grants, if the land could not be held by the grants themselves. The same remark may be applied to the 150 acres in Bedford county, with this additional observation; that, as Henry W. M. Connor did not execute a deed of conveyance for it at the time of the contract, but a bond for a conveyance, if the 150 acres is lost, or he is otherwise unable to convey, he is liable upon his bond, unless he afterwards made a conveyance agreeably to his bond; and in that case Hibbits would derive the same advantage of being entitled to a warrant for that quantity, notwithstanding *the opinion of [*206]

Henry W. M. Connor, as expressed in his letter to Miller to the contrary.

The only remaining ground of argument relied upon in support of the decree of the circuit court is, that the consideration, agreed to be given for the last assignment, has failed, and the assignment ought, therefore, to be set aside. But the consideration agreed upon has not failed. Hibbits, as must be inferred from the deeds for the two tracts of 1,000 acres each, was not to have a good and indefeasible title; but such title only as the grants might give, with the incidental advantages resulting from them by the laws of the country. The 150 acres may constitute a claim for damages, but furnishes no ground for setting aside the assignment of 1817.

This court is of opinion there is not sufficient evidence to show that the assignment, dated the day of June, 1817, was procured by fraud, or undue advantage taken of the situation of Hibbits; and that the said assignment ought not to have been set aside. The decree of the circuit court is, therefore, deemed erroneous, and must be reversed, and the cause remanded to the circuit court, with directions to dismiss the bill, with costs.

5 P. 190; 16 P. 234.

Edwards's Lessee v. Darby.

12 W. 206.

A question whether the French Lick reservation had been subjected to appropriation, by entry and survey, as vacant land, by statute of North Carolina or Tennessee.

In the construction of a doubtful law, the contemporaneous construction of persons appointed to execute it, is entitled to great respect.

[* 207] * This cause was argued by *Talbot*, for the plaintiff, and by *Eaton*, for the defendant.

Trimble, J., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court for the western district of Tennessee.

The plaintiff prosecuted an action of ejectment in that court, to recover possession of a small tract of 20 or 30 acres of land, which had been laid out in lots and squares as part of the town of Nashville, the tenants in possession being the owners or occupiers of such lots.

In the year 1818, Patrick H. Darby appropriated, by entry and survey, all that part of the town, from lot No. 141 to lot No. 165, the latter inclusive; and having obtained a grant therefor from the State of Tennessee, he, before the institution of the suit, conveyed the land by deed to Edwards. This was the plaintiff's title.

The legislature of North Carolina, by an act passed in the year 1782, entitled: "An act for the relief of the officers and soldiers in the continental line, and for other purposes therein mentioned," enacted, that certain bounties in land should be granted to the officers and soldiers in the line of that State, on continental establishment.

The 7th section of the act, after reciting that: "Whereas, in May 1780, an act passed reserving a certain tract of country to be appropriated to the aforesaid purposes, and that it had been represented to the assembly that sundry families had, before the passing of the said act, settled on the said tract of country, enacts that 640 acres of land shall be granted to each family, or head of a family, and to every single man of 21 years or upwards, (to include their improvements,) settled on said land before the 1st day of June, 1780, for which they shall have the right of preëmption; provided no such grant shall include any salt licks or salt springs, which are hereby declared to be reserved as public property, together with 640 acres of the adjoining lands, for the common use and benefit of the inhabitants of that country, and not subject to future appropriations; and all the remainder of the aforesaid tract of country shall be [*208] considered as subject to partition as by this act directed."

The 8th section appoints commissioners in behalf of the State, "to examine and superintend the laying off the land in one or more tracts, allotted to the officers and soldiers."

The 11th section authorizes the commissioners to appoint one or more surveyors, for the more speedy and effectual laying off and surveying said lands.

The commissioners, in the exercise of their powers in carrying this act into effect, determined the French Lick to be within the scope of its provisions, and a proper object of such reservation, and caused a survey to be made of said reservation, as early as 1784, which turns out to include 667¾ acres, instead of 640, and embraces within its limits the whole of the lots laid off in the town of Nashville, and the land covered by the grant to Patrick H. Darby.

In the year 1784, the legislature of North Carolina, by its act, appropriated 200 acres, part of said reservation, for the establishment of the town of Nashville, to be laid off at the bluff on the Cumberland River, nearest the French Lick; and commissioners are designated in the act to lay out the proposed town in streets, lots, and squares; to cause a plan thereof to be made out; and to sell and dispose of the lots in the town when thus laid off.

Upon the trial of the general issue in the circuit court, after the plaintiff had given in evidence the grant to Darby, and conveyance

from Darby to Edwards, already recited, the defendants gave evidence conducing to prove that the survey made of the reservation around the French Lick, by the commissioners, as early as 1784, included the whole of the land granted to Darby, and then in controversy; and also, that the commissioners, or trustees, for laying off the town of Nashville, had, in the year laid off and disposed of a part of the town lots; and that, afterwards, the commissioners had laid off and disposed of the additional lots, to 165 inclusive, about the year 1789 or 1790; but it appeared that the quantity of 200 acres was thereby [* 209] exceeded by 20 or 30 acres, such excess covering the * lots from 141 to 165 inclusive, but the whole of which lay within the French Lick reservation, as laid off by the commissioners about the year 1784.

The court instructed the jury, that if they found the land in controversy, and within Darby's grant, was also within the boundary of the town as actually laid off, although that boundary exceeded the quantity of 200 acres, or if they found it was within the actual survey of the French Lick reservation, as laid off in 1784, although it exceeded the quantity of 640 acres, the land was protected from individual appropriation by entry and survey, both by being so within the town boundary as laid off, and within the reservation as laid off; or if not by both, it was so protected by being included within the latter; and that, consequently, the grant to Darby was void.

To this opinion and instruction the plaintiff excepted, and his exception was sealed, and made part of the record.

It is not necessary to decide whether the land in controversy would or would not have been protected from individual appropriation, by being actually laid off and disposed of as town lots, beyond the quantity of 200 acres, as we are all of opinion it was so protected by being within the French Lick reservation, as laid off.

It is argued that the commissioners, appointed by the act of 1782, were not authorized to cause surveys to be made of the reservations of 640 acres around the reserved salt licks and springs, that the reservation was by quantity only, and that no legal effect can therefore be attributed to the survey. We admit the statute does not give the authority to survey the reservations, in express terms, but do not admit that the authority may not, and does not, result by necessary implication from the duties they were expressly required to perform, and from the general provisions of the statute. They were not expressly required by the statute to determine what licks and springs were proper objects for reservation, and came within the provisions of the statute; but they were required to lay off and cause to be

surveyed the lands granted to the officers and soldiers, subject to and so as not to interfere with these reservations. The right of pre-emption granted by law to the settlers of 640 acres each, including *their settlements, were also to be avoided. It [*210] seems to result necessarily from these provisions, that the commissioners must first determine what were the proper subjects of reservation, and having determined that a given salt lick or spring came within the provisions of the law, the power and duty of laying off by survey the 640 acres reserved, and to be avoided, around the lick, seems necessarily and irresistibly to result to the commissioners, in all cases where they might deem it necessary to do so, in order to enable them to lay off the lands for the officers and soldiers, so as to avoid these reservations. The adjacency of preëmption rights, too, might render it both necessary and proper that they, as well as the reservations, should be laid off, because both were to be avoided. But more especially it was indispensable wherever the commissioners were about to lay off lands for the officers and soldiers, adjacent to a salt lick or spring, to have a survey made of the reservation, to give it figure and fixed locality; otherwise, the reservation being of quantity only, without boundary, one of two consequences must have resulted, namely, that it might lawfully be encroached upon on one side, and if on one, on any other side; or that, practically, its uncertainty must have excluded a much larger quantity than was intended by law to be reserved from the satisfaction of the claims of the officers and soldiers.

In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect. The law was not only thus construed by the commissioners, but that construction seems to have received, very shortly after, the sanction of the legislature. By the 3d section of an act passed by the legislature of North Carolina, in 1789, entitled: "An act directing the sale of the salt licks and springs, with the adjoining land, within the district of Mero," it is enacted that the commissioners appointed to carry that act into effect "shall cause to be surveyed, where such surveys have not already been made, all the said salt licks and springs, with the 640 acres of adjoining land.

This provision must be construed as recognizing *the [*211] validity of, and as ratifying the surveys which had been made by the commissioners under the act of 1782.

The circumstance of the survey containing a considerable surplus we think immaterial. It was a public act, done by a public authorized agent of the government, and afterwards recognized by the

government itself. None but the government itself ought, therefore, to be permitted to call it in question.

It is argued that, however this may be, the legislature, by the act of 1789, above recited, have declared the whole of the reservation not otherwise appropriated to the Davison Academy, the 200 acres vested in the town, and the land granted to John M'Nairy, to be vacant unappropriated land, subject to individual appropriation, by entry, survey, and grant, in the ordinary mode; and that, as the land granted to Darby is not embraced by either of these prior appropriations, his grant is valid.

We are not of that opinion. The 2d section of the act of 1789, directs the county courts to make out lists "of all the salt licks and springs in their respective counties, which said courts shall deem fit for the purpose of manufacturing salt, including all such licks and springs as were set apart by commissioners heretofore appointed for that purpose, as public property, namely, Heaton's Lick, Denton's Lick, the French Lick, &c., which lists shall be entered on the records of said courts, and copies thereof delivered to the commissioners appointed by this act; and all other salt licks and springs, with the adjoining lands, not deemed by the court fit for the manufacturing of salt, be and they are hereby declared vacant land, and liable to be located and entered in the same manner as other vacant land."

The act then proceeds to direct how the commissioners appointed by that act shall proceed to sell the salt licks and springs, with the adjoining lands, listed as deemed fit for manufacturing salt. From these provisions, it was obviously the intention of the legislature, that all the salt licks and springs deemed fit for the manufacturing of salt, with the adjoining lands to each, shall be sold in the manner specially directed by the act; and the French Lick is, by the act itself, enumerated as one belonging to that class.

[* 212] * It was only those not deemed fit for the manufacture of salt, with the reserved lands adjoining them, that were declared vacant land, subject to be appropriated by location and entry. We can discover no other law of North Carolina or of Tennessee, which subjects the reservation about any of the licks deemed fit for manufacturing salt, to appropriation by entry and survey, as vacant land.

We, therefore, accord in opinion with the circuit court, that the grant to Patrick H. Darby is void.

The circuit court, as appears by the bill of exceptions, permitted evidence to be given, for the purpose of showing the court had no jurisdiction; and instructed the jury that if they believed the facts

which this evidence conduced to prove, the court had no jurisdiction over the cause. This was certainly irregular and improper. The jury were sworn to try the general issue, and the facts involved in it, not to try facts involved in a question of jurisdiction.

The instructions of the court were calculated to lead and divert the attention of the jury from the subjects of inquiry properly before them, to others in no way connected with the issue. For this error, the judgment of the circuit court must be reversed, the cause remanded to the circuit court, with directions to set aside the verdict, and for new proceedings to be had therein, not inconsistent with the judgment of this court.

Devereaux v. Marr.

12 W. 212.

This court cannot take jurisdiction upon a certificate of a question on which the opinions of the judges of the circuit court are opposed, upon some proceeding subsequent to the decision of the cause in that court.

In this case, the judges of the circuit court of West Tennessee, after a judgment had been rendered in that court, [* 213] divided in opinion upon the question as to the amount of the security bond, to be given by the party applying for a writ of error, whether the amount of the bond ought to be sufficient to cover the whole debt, or only for the costs and increased damages on the party failing to prosecute his writ of error with effect. Whereupon the division of opinions was certified to this court, under the 6th section of the act of the 29th April, 1802, (2 Stats. at Large, 159.)

Eaton, for the plaintiff.

White, for the defendant.

This Court was of opinion, that it had no jurisdiction of the question on which the opinions of the judges of the circuit court were opposed, the division of opinions having arisen after the decision of the cause in that court. *Certificate, accordingly.*

7 H. 185.

Ogden, Plaintiff in Error, *v.* Saunders, Defendant in Error.

12 W. 213.

An insolvent law of a State does not impair the obligation of future contracts between its citizens. But it cannot affect the rights of creditors who are citizens of other States.

Error to the district court of the United States for Louisiana.

This was an action of *assumpsit*, brought in the court
[* 214] *below, by the defendant in error, Saunders, a citizen of Kentucky, against the plaintiff in error, Ogden, a citizen of Louisiana. The plaintiff below declared upon certain bills of exchange, drawn on the 30th of September, 1806, by one Jordan, at Lexington, in the State of Kentucky, upon the defendant below, Ogden, in the city of New York, (the defendant then being a citizen and resident of the State of New York,) accepted by him at the city of New York, and protested for non-payment.

The defendant below pleaded several pleas, among which was a certificate of discharge under the act of the legislature of the State of New York, of April 3, 1801, for the relief of insolvent debtors, commonly called the three fourths act.

The jury found the facts in the form of a special verdict, on which the court rendered a judgment for the plaintiff below, and the cause was brought by writ of error before this court. The question which arose under this plea as to the validity of the law of New York as being repugnant to the constitution of the United States, was argued at February term, 1824, by *Clay*, *D. B. Ogden*, and *Haines*, for the plaintiff in error, and by *Webster* and *Wheaton*, for the defendant in error, and the cause was continued for advisement until the present term. It was again argued at the present term, (in connection with several other causes standing on the calendar, and involving the general question of the validity of the state bankrupt, or insolvent laws,) by *Webster* and *Wheaton*, against the validity, and by the *Attorney-General*, *E. Livingston*, *D. B. Ogden*, *Jones*, and *Sampson*, for the validity.

[* 254] The learned judges delivered their opinions as follows: —

Washington, J. The first and most important point to be decided in this cause, turns essentially upon the question, whether the obligation of a contract is impaired by a State bankrupt or insolvent law, which discharges the person and the future acquisitions of the debtor from his liability under a contract entered into in that State after the passage of the act.

This question has never before been distinctly presented to the consideration of this court, and decided, although it has been supposed by the judges of a highly respectable state court, that it was decided in the case of M'Millan *v.* M'Neal, 4 W. 209. That was the case of a debt contracted by two citizens of South Carolina, in that State, the discharge of which had a view to no other State. The debtor afterwards removed to the territory of Louisiana, where he was regularly discharged, as an insolvent, from all his debts, under an act of the legislature of that State passed prior to the time when the debt in question was contracted. To an action brought by the creditor in the district court of Louisiana, the defendant plead in bar his discharge, under the law of that territory, and it was contended by the counsel for the debtor in this court, that the law under which the debtor was discharged, having passed before the contract was made, it could not be said to impair its obligation. The cause was argued on one side only, and it would seem from the report of the case, that no written opinion was prepared by the court. The chief justice stated that the circumstance of the state law under which the debt was attempted to be discharged having been passed before the debt was contracted, made no difference in the application of the principle which had been asserted by the * court in [* 255] the case of Sturges *v.* Crowninshield, 4 W. 122. The correctness of this position is believed to be incontrovertible. The principle alluded to was, that a state bankrupt law which impairs the obligation of a contract, is unconstitutional in its application to such contract. In that case, it is true, the contract preceded in order of time the act of assembly, under which the debtor was discharged, although it was not thought necessary to notice that circumstance in the opinion which was pronounced. The principle, however, remained, in the opinion of the court delivered in M'Millan *v.* M'Neal, unaffected by the circumstance that the law of Louisiana preceded a contract made in another State; since that law, having no extra-territorial force, never did at any time govern or affect the obligation of such contract. It could not, therefore, be correctly said to be prior to the contract, in reference to its obligation; since if, upon legal principles, it could affect the contract, that could not happen until the debtor became a citizen of Louisiana, and that was subsequent to the contract. But I hold the principle to be well established, that a discharge under the bankrupt laws of one government does not affect contracts made or to be executed under another, whether the law be prior or subsequent in the date to that of the contract; and this I take to be the only point really decided in the case alluded to. Whether the chief justice was correctly understood by the reporter,

when he is supposed to have said, "that this case was not distinguishable in principle from the preceding case of Sturges *v.* Crowninshield," it is not material at this time to inquire, because I understand the meaning of these expressions to go no further than to intimate, that there was no distinction between the cases as to the constitutional objection, since it professed to discharge a debt contracted in another State, which, at the time it was contracted, was not within its operation, nor subject to be discharged by it. The case now to be decided, is that of a debt contracted in the State of New York, by a citizen of that State, from which he was discharged, so far as he constitutionally could be, under a bankrupt law of that State, in force at the time when the debt was contracted. It is a case, therefore, that bears no resemblance to the one just noticed.

[* 256] * I come now to the consideration of the question, which, for the first time, has been directly brought before this court for judgment. I approach it with more than ordinary sensibility, not only on account of its importance, which must be acknowledged by all, but of its intrinsic difficulty, which every step I have taken in arriving at a conclusion with which my judgment could in any way be satisfied, has convinced me attends it. I have examined both sides of this great question with the most sedulous care, and the most anxious desire to discover which of them, when adopted, would be most likely to fulfil the intentions of those who framed the constitution of the United States. I am far from asserting that my labors have resulted in entire success. They have led me to the only conclusion by which I can stand with any degree of confidence; and yet, I should be disingenuous were I to declare, from this place, that I embrace it without hesitation, and without a doubt of its correctness. The most that candor will permit me to say upon the subject is, that I see, or think I see, my way more clear on the side which my judgment leads me to adopt, than on the other, and it must remain for others to decide whether the guide I have chosen has been a safe one or not.

It has constantly appeared to me, throughout the different investigations of this question to which it has been my duty to attend, that the error of those who controvert the constitutionality of the bankrupt law under consideration, in its application to this case, if they be in error at all, has arisen from not distinguishing accurately between a law which impairs a contract, and one which impairs its obligation. A contract is defined by all to be an agreement to do or not to do some particular act; and in the construction of this agreement, depending essentially upon the will of the parties between whom it is formed, we seek for their intention with a view to fulfil it. Any law,

then, which enlarges, abridges, or in any manner changes this intention, when it is discovered, necessarily impairs the contract itself, which is but the evidence of that intention. The manner or the degree in which this change is effected, can in no respect influence this conclusion; for whether the law affect the validity, the construction, the duration, the mode of *discharge, or the [*257] evidence of the agreement, it impairs the contract, though it may not do so to the same extent in all the supposed cases. Thus, a law which declares that no action shall be brought whereby to charge a person upon his agreement to pay the debt of another, or upon an agreement relating to lands, unless the same be reduced to writing, impairs a contract made by parol, whether the law precede or follow the making of such contract; and, if the argument that this law also impairs, in the former case, the obligation of the contract, be sound, it must follow that the statute of frauds, and all other statutes which in any manner meddle with contracts, impair their obligation, and are consequently within the operation of this section and article of the constitution. It will not do to answer that, in the particular case put, and in others of the same nature, there is no contract to impair, since the preëxisting law denies all remedy for its enforcement, or forbids the making of it, since it is impossible to deny that the parties have expressed their will in the form of a contract, notwithstanding the law denies to it any valid obligation.

This leads us to a critical examination of the particular phraseology of that part of the above section which relates to contracts. It is a law which impairs the obligation of contracts, and not the contracts themselves, which is interdicted. It is not to be doubted that this term obligation, when applied to contracts, was well considered and weighed by those who framed the constitution, and was intended to convey a different meaning from what the prohibition would have imported without it. It is this meaning of which we are all in search.

What is it, then, which constitutes the obligation of a contract? The answer is given by the chief justice, in the case of Sturges v. Crowninshield, to which I readily assent now, as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction, or discharge.

But the question, which law is referred to in the above *definition, still remains to be solved. It cannot, for a [*258] moment, be conceded that the mere moral law is intended, since the obligation which that imposes is altogether of the imperfect

kind which the parties to it are free to obey or not, as they please. It cannot be supposed that it was with this law the grave authors of this instrument were dealing.

The universal law of all civilized nations, which declares that men shall perform that to which they have agreed, has been supposed by the counsel who have argued this cause for the defendant in error, to be the law which is alluded to; and I have no objection to acknowledging its obligation, whilst I must deny that it is that which exclusively governs the contract. It is upon this law that the obligation which nations acknowledge to perform their compacts with each other is founded, and I, therefore, feel no objection to answer the question asked by the same counsel—what law it is which constitutes the obligation of the compact between Virginia and Kentucky —by admitting, that it is this common law of nations which requires them to perform it. I admit further that it is this law which creates the obligation of a contract made upon a desert spot, where no municipal law exists, and (which was another case put by the same counsel) which contract, by the tacit assent of all nations, their tribunals are authorized to enforce.

But can it be seriously insisted that this, any more than the moral law upon which it is founded, was exclusively in the contemplation of those who framed this constitution? What is the language of this universal law? It is simply that all men are bound to perform their contracts. The injunction is as absolute as the contracts to which it applies. It admits of no qualification and no restraint, either as to its validity, construction, or discharge, further than may be necessary to develop the intention of the parties to the contract. And if it be true that this is exclusively the law to which the constitution refers us, it is very apparent that the sphere of state legislation upon subjects connected with the contracts of individuals, would be abridged beyond what it can for a moment be believed the sovereign States of this Union would have consented to; for it will be found, upon examination, that there are few laws which [* 259] concern the general * police of a State, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into, or may thereafter form. For what are laws of evidence, or which concern remedies — frauds and perjuries — laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern keepers, and a multitude of others which crowd the codes of every State, but laws which may affect the validity, construction, or duration, or discharge of contracts?

Whilst I admit, then, that this common law of nations, which has been mentioned, may form in part the obligation of a contract, I must unhesitatingly insist that this law is to be taken in strict subordination to the municipal laws of the land where the contract is made, or is to be executed. The former can be satisfied by nothing short of performance; the latter may affect and control the validity, construction, evidence, remedy, performance, and discharge of the contract. The former is the common law of all civilized nations, and of each of them; the latter is the peculiar law of each, and is paramount to the former whenever they come in collision with each other.

It is, then, the municipal law of the State, whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, wherever its performance is sought to be enforced.

It forms, in my humble opinion, a part of the contract, and travels with it wherever the parties to it may be found. It is so regarded by all the civilized nations of the world, and is enforced by the tribunals of those nations according to its own forms, unless the parties to it have otherwise agreed, as where the contract is to be executed in, or refers to the laws of, some other country than that in which it is formed, or where it is of an immoral character, or contravenes the policy of the nation to whose tribunals the appeal is made; in which latter cases, the remedy which the comity of nations affords for enforcing the obligation of contracts wherever formed, is denied. Free from these objections, this law, which accompanies the contract as forming a part of *it, is regarded and en- [*260] forced everywhere, whether it affect the validity, construction, or discharge of the contract. It is upon this principle of universal law, that the discharge of the contract, or of one of the parties to it, by the bankrupt laws of the country where it was made, operates as a discharge everywhere.

If, then, it be true that the law of the country where the contract is made or to be executed, forms a part of that contract and of its obligation, it would seem to be somewhat of a solecism to say that it does, at the same time, impair that obligation.

But it is contended that if the municipal law of the State where the contract is so made form a part of it, so does that clause of the constitution which prohibits the States from passing laws to impair the obligation of contracts; and, consequently, that the law is rendered inoperative by force of its controlling associate. All this I admit, provided it be first proved that the law so incorporated with and forming a part of the contract, does, in effect, impair its obligation;

and before this can be proved, it must be affirmed and satisfactorily made out, that if, by the terms of the contract, it is agreed that, on the happening of a certain event, as, upon the future insolvency of one of the parties, and his surrender of all his property for the benefit of his creditors, the contract shall be considered as performed and at an end, this stipulation would impair the obligation of the contract. If this proposition can be successfully affirmed, I can only say, that the soundness of it is beyond the reach of my mind to understand.

Again; it is insisted that if the law of the contract forms a part of it, the law itself cannot be repealed without impairing the obligation of the contract. This proposition I must be permitted to deny. It may be repealed at any time, at the will of the legislature, and then it ceases to form any part of those contracts which may afterwards be entered into. The repeal is no more void than a new law would be which operates upon contracts to affect their validity, construction, or duration. Both are valid, (if the view which I take of this case be correct,) as they may affect contracts afterwards formed; but neither are so, if they bear upon existing contracts; [*261] and, in the former case, in which the *repeal contains no enactment, the constitution would forbid the application of the repealing law to past contracts, and to those only.

To illustrate this argument, let us take four laws, which, either by new enactments, or by the repeal of former laws, may affect contracts as to their validity, construction, evidence, or remedy.

Laws against usury are of the first description.

A law which converts a penalty, stipulated for by the parties, as the only atonement for a breach of the contract, into a mere agreement for a just compensation, to be measured by the legal rate of interest, is of the second.

The statute of frauds, and the statute of limitations, may be cited as examples of the last two.

The validity of these laws can never be questioned by those who accompany me in the view which I take of the question under consideration, unless they operate, by their express provisions, upon contracts previously entered into; and even then they are void only so far as they do so operate; because, in that case, and in that case only, do they impair the obligation of those contracts. But if they equally impair the obligation of contracts subsequently made, which they must do, if this be the operation of a bankrupt law upon such contracts, it would seem to follow that all such laws, whether in the form of new enactments, or of repealing laws, producing the same legal consequences, are made void by the constitution; and yet the

counsel for the defendants in error have not ventured to maintain so alarming a proposition.

If it be conceded that those laws are not repugnant to the constitution, so far as they apply to subsequent contracts, I am yet to be instructed how to distinguish between those laws, and the one now under consideration. How has this been attempted by the learned counsel who have argued this cause upon the ground of such a distinction?

They have insisted that the effect of the law first supposed, is to annihilate the contract in its birth, or rather to prevent it from having a legal existence, and consequently, that there is no obligation to be impaired. But this is clearly not so, since it may legitimately avoid all contracts *afterwards entered into, [*262] which reserve to the lender a higher rate of interest than this law permits.

The validity of the second law is admitted, and yet this can only be in its application to subsequent contracts; for it has not, and I think it cannot, for a moment, be maintained, that a law which, in express terms, varies the construction of an existing contract, or which, repealing a former law, is made to produce the same effect, does not impair the obligation of that contract.

The statute of frauds, and the statute of limitations, which have been put as examples of the third and fourth classes of laws, are also admitted to be valid, because they merely concern the modes of proceeding in the trial of causes. The former, supplying a rule of evidence, and the latter, forming a part of the remedy given by the legislature to enforce the obligation, and likewise providing a rule of evidence.

All this I admit. But how does it happen that these laws, like those which affect the validity and construction of contracts, are valid as to subsequent, and yet void as to prior and subsisting contracts? For we are informed by the learned judge who delivered the opinion of this court, in the case of Sturges *v.* Crowninshield, 4 W. 122, that, "if, in a State where six years may be pleaded in bar to an action of *assumpsit*, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed within it, there could be little doubt of its unconstitutionality."

It is thus most apparent that, which ever way we turn, whether to laws affecting the validity, construction, or discharges of contracts, or the evidence or remedy to be employed in enforcing them, we are met by this overruling and admitted distinction, between *those which operate retrospectively, and those which operate prospectively. In all of them the law is pronounced to be void in the first class of cases, and not so in the second.

Let us stop, then, to make a more critical examination of the act of limitations, which, although it concerns the remedy, or, if it must be conceded, the evidence, is yet void or otherwise, as it is made to apply retroactively, or prospectively, and see if it can, upon [*263] any intelligible principle, be *distinguished from a bankrupt law, when applied in the same manner. What is the effect of the former? The answer is, to discharge the debtor and all his future acquisitions from his contract; because he is permitted to plead it in bar of any remedy which can be instituted against him, and consequently in bar or destruction of the obligation which his contract imposed upon him. What is the effect of a discharge under a bankrupt law? I can answer this question in no other terms than those which are given to the former question. If there be a difference, it is one which, in the eye of justice, at least, is more favorable to the validity of the latter than of the former; for in the one, the debtor surrenders every thing which he possesses towards the discharge of his obligation, and in the other, he surrenders nothing, and sullenly shelters himself behind a legal objection with which the law has provided him, for the purpose of protecting his person, and his present as well as his future acquisitions, against the performance of his contract.

It is said that the former does not discharge him absolutely from his contract, because it leaves a shadow sufficiently substantial to raise a consideration for a new promise to pay. And is not this equally the case with a certificated bankrupt, who afterwards promises to pay a debt from which his certificate had discharged him? In the former case, it is said the defendant must plead the statute in order to bar the remedy and to exempt him from his obligation. And so, I answer, he must plead his discharge under the bankrupt law, and his conformity to it, in order to bar the remedy of his creditor, and to secure to himself a like exemption. I have, in short, sought in vain for some other grounds on which to distinguish the two laws from each other than those which were suggested at the bar. I can imagine no other, and I confidently believe that none exist which will bear the test of a critical examination.

To the decision of this court, made in the case of Sturges *v.* Crowninshield, and to the reasoning of the learned judge who delivered that opinion, I entirely submit; although I did not then, nor can I now bring my mind to concur in that part of it which admits the constitutional power of the state legislatures to pass bankrupt laws, by which I understand those laws which discharge the [*264] person and the future *acquisitions of the bankrupt from his debts. I have always thought that the power to pass

such a law was exclusively vested by the constitution in the legislature of the United States. But it becomes me to believe that this opinion was and is incorrect, since it stands condemned by the decision of a majority of this court, solemnly pronounced.

After making this acknowledgment, I refer again to the above decision with some degree of confidence in support of the opinion, to which I am now inclined to come, that a bankrupt law which operates prospectively, or in so far as it does so operate, does not violate the constitution of the United States. It is there stated "that, until the power to pass uniform laws on the subject of bankruptcies be exercised by congress, the States are not forbidden to pass a bankrupt law, provided it contain no principle which violates the 10th section of the 1st article of the constitution of the United States." The question in that case was, whether the law of New York, passed on the 3d of April, 1811, which liberates not only the person of the debtor, but discharges him from all liability for any debt contracted previous as well as subsequent to his discharge, on his surrendering his property for the use of his creditors, was a valid law under the constitution, in its application to a debt contracted prior to its passage. The court decided that it was not, upon the single ground that it impaired the obligation of that contract. And if it be true that the States cannot pass a similar law to operate upon contracts subsequently entered into, it follows inevitably, either that they cannot pass such laws at all, contrary to the express declaration of the court, as before quoted, or that such laws do not impair the obligation of contracts subsequently entered into; in fine, it is a self-evident proposition that every contract that can be formed, must either precede or follow any law by which it may be affected.

I have, throughout the preceding part of this opinion, considered the municipal law of the country where the contract is made as incorporated with the contract, whether it affects its validity, construction, or discharge. But I think it quite immaterial to stickle for this position, if it be conceded to me, what can scarcely be denied, that this * municipal law constitutes the law of the [*265] contract so formed, and must govern it throughout. I hold the legal consequences to be the same in whichever view the law, as it affects the contract, is considered.

I come now to a more particular examination and construction of the section under which this question arises; and I am free to acknowledge that the collocation of the subjects for which it provides, has made an irresistible impression upon my mind, much stronger, I am persuaded, than I can find language to communicate to the minds of others.

It declares that "no State shall coin money, emit bills of credit, make any thing but gold and silver coin a tender in payment of debts." These prohibitions, associated with the powers granted to congress "to coin money, and to regulate the value thereof, and of foreign coin," most obviously constitute members of the same family, being upon the same subject and governed by the same policy.

This policy was to provide a fixed and uniform standard of value throughout the United States, by which the commercial and other dealings between the citizens thereof, or between them and foreigners, as well as the moneyed transactions of the government, should be regulated. For it might well be asked, why vest in congress the power to establish a uniform standard of value by the means pointed out, if the States might use the same means, and thus defeat the uniformity of the standard, and, consequently the standard itself? And why establish a standard at all, for the government of the various contracts which might be entered into, if those contracts might afterwards be discharged by a different standard, or by that which is not money, under the authority of State tender laws? It is obvious, therefore, that these prohibitions, in the 10th section, are entirely homogeneous, and are essential to the establishment of a uniform standard of value, in the formation and discharge of contracts. It is for this reason, independent of the general phraseology which is employed, that the prohibition in regard to State tender laws will admit of no construction which would confine it to State laws which have a retrospective operation.

[* 266] * The next class of prohibitions contained in this section consists of bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts.

Here, too, we observe, as I think, members of the same family brought together in the most intimate connection with each other. The States are forbidden to pass any bill of attainder or *ex post facto* law, by which a man shall be punished criminally or penally, by loss of life, of his liberty, property, or reputation, for an act which, at the time of its commission, violated no existing law of the land. Why did the authors of the constitution turn their attention to this subject, which, at the first blush, would appear to be peculiarly fit to be left to the discretion of those who have the police and good government of the State under their management and control? The only answer to be given is, because laws of this character are oppressive, unjust, and tyrannical; and, as such, are condemned by the universal sentence of civilized man. The injustice and tyranny which characterizes *ex post facto* laws, consists altogether in their retrospective

operation, which applies with equal force, although not exclusively, to bills of attainder.

But if it was deemed wise and proper to prohibit State legislation as to retrospective laws, which concern, almost exclusively, the citizens and inhabitants of the particular State in which this legislation takes place, how much more did it concern the private and political interests of the citizens of all the States, in their commercial and ordinary intercourse with each other, that the same prohibition should be extended civilly to the contracts which they might enter into?

If it were proper to prohibit a state legislature to pass a retrospective law, which should take from the pocket of one of its own citizens a single dollar as a punishment for an act which was innocent at the time it was committed; how much more proper was it to prohibit laws of the same character precisely, which might deprive the citizens of other States, and foreigners as well as citizens of the same State, of thousands, to which, by their contracts, they were justly entitled, and which they might possibly have realized but for such state interference? How natural, then, was it, under the influence of these considerations, to interdict [*267] similar legislation in regard to contracts, by providing that no State should pass laws impairing the obligation of past contracts? It is true that the first two of these prohibitions apply to laws of a criminal, and the last to laws of a civil character; but if I am correct in my view of the spirit and motives of these prohibitions, they agree in the principle which suggested them. They are founded upon the same reason, and the application of it is at least as strong to the last as it is to the first two prohibitions.

But these reasons are altogether inapplicable to laws of a prospective character. There is nothing unjust or tyrannical in punishing offences prohibited by law, and committed in violation of that law. Nor can it be unjust or oppressive, to declare by law that contracts subsequently entered into, may be discharged in a way different from that which the parties have provided, but which they know, or may know, are liable, under certain circumstances, to be discharged in a manner contrary to the provisions of their contract.

Thinking, as I have always done, that the power to pass bankrupt laws was intended by the authors of the constitution to be exclusive in congress, or, at least, that they expected the power vested in that body would be exercised, so as effectually to prevent its exercise by the States, it is the more probable that, in reference to all other interferences of the state legislatures upon the subject of contracts, retrospective laws were alone in the contemplation of the convention.

In the construction of this clause of the 10th section of the constitution, one of the counsel for the defendant supposed himself at liberty so to transpose the provisions contained in it, as to place the prohibition to pass laws impairing the obligation of contracts in juxtaposition with the other prohibition to pass laws making any thing but gold and silver coin a tender in payment of debts, inasmuch as the two provisions relate to the subject of contracts.

That the derangement of the words and even sentences of a law may sometimes be tolerated, in order to arrive at the appar-
[*268] ent meaning of the legislature, to be gathered from * other parts, or from the entire scope of the law, I shall not deny. But I should deem it a very hazardous rule to adopt in the construction of an instrument so maturely considered as this constitution was by the enlightened statesmen who framed it, and so severely examined and criticized by its opponents in the numerous state conventions which finally adopted it. And if, by the construction of this sentence, arranged as it is, or as the learned counsel would have it to be, it could have been made out that the power to pass prospective laws, affecting contracts, was denied to the States, it is most wonderful that not one voice was raised against the provision, in any of those conventions, by the jealous advocates of state rights, nor even an amendment proposed, to explain the clause, and to exclude a construction which trenches so extensively upon the sphere of state legislation.

But, although the transposition which is contended for may be tolerated in cases where the obvious intention of the legislature can in no other way be fulfilled, it can never be admitted in those where consistent meaning can be given to the whole clause as its authors thought proper to arrange it, and where the only doubt is whether the construction which the transposition countenances, or that which results from the reading which the legislature has thought proper to adopt, is most likely to fulfil the supposed intention of the legislature. Now, although it is true that the prohibition to pass tender laws of a particular description, and laws impairing the obligation of contracts, relate, both of them, to contracts, yet, the principle which governs each of them, clearly to be inferred from the subjects with which they stand associated, is altogether different; that of the first forming part of a system for fixing a uniform standard of value, and, of the last, being founded on a denunciation of retrospective laws. It is, therefore, the safest course, in my humble opinion, to construe this clause of the section according to the arrangement which the convention has thought proper to make of its different provisions. To insist upon a transposition, with a view to warrant

one construction rather than the other, falls little short, in my opinion, of a begging of the whole question in controversy.

*But why, it has been asked, forbid the States to pass [*269] laws making any thing but gold and silver coin a tender in payment of debts contracted subsequent as well as prior to the law which authorizes it; and yet confine the prohibition to pass laws impairing the obligation of contracts to past contracts, or, in other words, to future bankrupt laws, when the consequence resulting from each is the same, the latter being considered by the counsel as being, in truth, nothing less than tender laws in disguise.

An answer to this question has, in part, been anticipated by some of the preceding observations. The power to pass bankrupt laws having been vested in congress, either as an exclusive power, or under the belief that it would certainly be exercised, it is highly probable that state legislation upon that subject was not within the contemplation of the convention; or, if it was, it is quite unlikely that the exercise of the power, by the state legislatures, would have been prohibited by the use of terms which, I have endeavored to show, are inapplicable to laws intended to operate prospectively. For had the prohibition been to pass laws impairing contracts, instead of the obligation of contracts, I admit that it would have borne the construction which is contended for, since it is clear that the agreement of the parties in the first case, would be impaired as much by a prior as it would be by a subsequent bankrupt law. It has, besides, been attempted to be shown that the limited restriction upon state legislation, imposed by the former prohibition, might be submitted to by the States, whilst the extensive operation of the latter would have hazarded, to say the least of it, the adoption of the constitution by the state conventions.

But an answer, still more satisfactory to my mind, is this: tender laws, of the description stated in this section, are always unjust; and, where there is an existing bankrupt law at the time the contract is made, they can seldom be useful to the honest debtor. They violate the agreement of the parties to it, without the semblance of an apology for the measure, since they operate to discharge the debtor from his undertaking, upon terms variant from those by which he bound himself, to the injury of the creditor, and unsupported, *in many cases, by the plea of necessity. They [*270] extend relief to the opulent debtor, who does not stand in need of it; as well as to the one who is, by misfortunes, often unavoidable, reduced to poverty, and disabled from complying with his engagements. In relation to subsequent contracts, they are unjust when extended to the former class of debtors, and useless to

the second, since they may be relieved by conforming to the requisitions of the state bankrupt law, where there is one. Being discharged by this law from all his antecedent debts, and having his future acquisitions secured to him, an opportunity is afforded him to become once more a useful member of society.

If this view of the subject be correct, it will be difficult to prove that a prospective bankrupt law resembles, in any of its features, a law which should make any thing but gold and silver coin a tender in payment of debts.

I shall now conclude this opinion by repeating the acknowledgment which candor compelled me to make in its commencement, that the question which I have been examining is involved in difficulty and doubt. But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this court, when that subject has called for its decision; and I know that it expresses the honest sentiments of each and every member of this bench. I am perfectly satisfied that it is entertained by those of them from whom it is the misfortune of the majority of the court to differ on the present occasion, and that they feel no reasonable doubt of the correctness of the conclusion to which their best judgment has conducted them.

My opinion is, that the judgment of the court below ought to be reversed, and judgment given for the plaintiff in error.

[*271] *JOHNSON, J. This suit was instituted in Louisiana, in the circuit court of the United States, by Saunders, the defendant here, against Ogden, upon certain bills of exchange. Ogden, the defendant there, pleads, in bar to the action, a discharge obtained, in due form of law, from the courts of the State of New York, which discharge purports to release him from all debts and demands existing against him on a specified day. This demand is one of that description; and the act under which the discharge was obtained, was the act of New York, of 1801, a date long prior to that of the cause of action on which this suit was instituted. The discharge is set forth in the plea, and represents Ogden as "an insolvent debtor, being, on the day and year thereinafter mentioned, in prison, in the city and county of New York, on execution issued against him

on some civil action," &c. It does not appear that any suit had ever been instituted against him by this party, or on this cause of action, prior to the present. The cause below was decided upon a special verdict, in which the jury find: —

1. That the acceptance of the bills on which the action was instituted, was made by Ogden, in the city of New York, on the days they severally bear date, the said defendant then residing in the city of New York, and continuing to reside there until a day not specified.

2. That under the laws of the State of New York, in such case provided, and referred to in the discharge, (which laws are specially found, &c., meaning the State law of 1801,) application was made for, and the defendant obtained, the discharge hereunto annexed.

3. That, by the laws of New York, actions on bills of exchange, and acceptances thereof, are limited to the term of six years; and,

4. That at the time the said bills were drawn and accepted, the drawee and the drawer of the same, were residents and citizens of the State of Kentucky.

On this state of facts the court below gave judgment against Ogden, the discharged debtor.

We are not in possession of the grounds of the decision below; and it has been argued here, as having been given upon the general nullity of the discharge, on the ground of its unconstitutionality. But it is obvious that it might also have *proceeded upon [*272] the ground of its nullity as to citizens of other States, who have never, by any act of their own, submitted themselves to the *lex fori* of the State that gives the discharge — considering the right given by the constitution to go into the courts of the United States upon any contracts, whatever be their *lex loci*, as modifying and limiting the general power which States are acknowledged to possess over contracts formed under control of their peculiar laws.

This question, however, has not been argued, and must not now be considered as disposed of by this decision.

The abstract question of the general power of the States to pass laws for the relief of insolvent debtors, will be alone considered. And here, in order to ascertain with precision what we are to decide, it is first proper to consider what this court has already decided on this subject. And this brings under review the two cases of Sturges *v.* Crowninshield, and M'Millan *v.* M'Neal, adjudged in the year 1819, and contained in the 4th vol. of Wheaton's Reports, 122 and 209. If the marginal note to the report, or summary of the effect of the case of M'Millan *v.* M'Neal, presented a correct view of the report of that decision, it is obvious that there would remain very little, if any

thing, for this court to decide. But by comparing the note of the reporter with the facts of the case, it will be found that there is a generality of expression admitted into the former, which the case itself does not justify. The principle recognized and affirmed in M'Millan *v.* M'Neal, is one of universal law, and so obvious and incontestable that it need be only understood to be assented to. It is nothing more than this, "that insolvent laws have no extra-territorial operation upon the contracts of other States; that the principle is applicable as well to the discharges given under the laws of the States, as of foreign countries; and that the anterior or posterior character of the law under which the discharge is given, with reference to the date of the contract, makes no discrimination in the application of that principle."

The report of the case of Sturges *v.* Crowninshield needs also some explanation. The court was, in that case, greatly divided in their views of the doctrine, and the judgment partakes as much [*273] of a compromise, as of a legal * adjudication. The minority thought it better to yield something than risk the whole. And, although their course of reasoning led them to the general maintenance of the state power over the subject, controlled and limited alone by the oath administered to all their public functionaries to maintain the constitution of the United States, yet, as denying the power to act upon anterior contracts could do no harm, but, in fact, imposed a restriction conceived in the true spirit of the constitution, they were satisfied to acquiesce in it, provided the decision were so guarded as to secure the power over posterior contracts, as well from the positive terms of the adjudication, as from inferences deducible from the reasoning of the court.

The case of Sturges *v.* Crowninshield, then, must, in its authority, be limited to the terms of the certificate, and that certificate affirms two propositions.

1. That a State has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts within the meaning of the constitution, and provided there be no act of congress in force to establish an uniform system of bankruptcy, conflicting with such law.

2. That a law of this description, acting upon prior contracts, is a law impairing the obligation of contracts within the meaning of the constitution.

Whatever inferences or whatever doctrines the opinion of the court in that case may seem to support, the concluding words of that opinion were intended to control and to confine the authority of the adjudication to the limits of the certificate.

I should, therefore, have supposed that the question of exclusive power in congress to pass a bankrupt law was not now open; but it has been often glanced at in argument, and I have no objection to express my individual opinion upon it. Not having recorded my views on this point in the case of Crowninshield, I avail myself of this occasion to do so.

So far, then, am I from admitting that the constitution affords any ground for this doctrine, that I never had a doubt that the leading object of the constitution was to bring in aid of the States a power over this subject, which their individual powers never could attain to; so far from limiting, *modifying, and attenuating [*274] legislative power in its known and ordinary exercise in favor of unfortunate debtors, that its sole object was to extend and perfect it, as far as the combined powers of the States, represented by the general government, could extend it. Without that provision, no power would have existed that could extend a discharge beyond the limits of the State in which it was given, but with that provision it might be made coextensive with the United States. This was conducing to one of the great ends of the constitution, one which it never loses sight of in any of its provisions, that of making an American citizen as free in one State as he was in another. And when we are told that this instrument is to be construed with a view to its federative objects, I reply that this view alone of the subject is in accordance with its federative character.

Another object in perfect accordance with this, may have been that of exercising a salutary control over the power of the States, whenever that power should be exercised without due regard to the fair exercise of distributive justice. The general tendency of the legislation of the States at that time to favor the debtor, was a consideration which entered deeply into many of the provisions of the constitution. And as the power of the States over the law of their respective forums remained untouched by any other provision of the constitution; when vesting in congress the power to pass a bankrupt law, it was worthy of the wisdom of the convention to add to it the power to make that system uniform and universal. Yet, on this subject, the use of the term uniform, instead of general, may well raise a doubt whether it meant more than that such a law should not be partial, but have an equal and uniform application in every part of the Union. This is in perfect accordance with the spirit in which various other provisions of the constitution are conceived.

For these two objects there appears to have been much reason for vesting this power in congress; but for extending to the grant the effect of exclusiveness over the power of the States, appears to me

not only without reason, but to be repelled by weighty considerations.

1. There is nothing which, on the face of the constitution, bears the semblance of direct prohibition on the States to exer-
[*275] cise *this power; and it would seem strange that, if such a prohibition had been in the contemplation of the convention, when appropriating an entire section to the enumeration of prohibitions on the States, they had forgotten this, if they had intended to enact it.

The antithetical language adopted in that section, as to every other subject to which the power of congress had been previously extended, affords a strong reason to conclude that some direct and express allusion to the power to pass a bankrupt law would have been here inserted also, if they had not intended that this power should be concurrently, or, at least, subordinately exercised by the States. It cannot be correct reasoning to rely upon this fact as a ground to infer that the prohibition must be found in some provision not having that antithetical character, since this supposes an intention to insert the prohibition, which intention can only be assumed. Its omission is a just reason for forming no other conclusion than that it was purposely omitted. But,

2. It is insisted that, though not express, the prohibition is to be inferred from the grant to congress to establish uniform laws on the subject of bankruptcies throughout the United States; and that this grant, standing in connection with that to establish an uniform rule of naturalization, which is, in its nature, exclusive, must receive a similar construction.

There are many answers to be given to this argument; and the first is, that a mere grant of a State power does not, in itself, necessarily imply an abandonment or relinquishment of the power granted, or we should be involved in the absurdity of denying to the States the power of taxation, and sundry other powers ceded to the general government. But much less can such a consequence follow from vesting in the general government a power which no State possessed, and which all of them combined could not exercise to meet the end proposed in the constitution. For, if every State in the Union were to pass a bankrupt law in the same unvarying words, although this would, undoubtedly, be an uniform system of bankruptcy in its literal sense, it would be very far from answering the grant to congress.

There would still need some act of congress, or some treaty
[*276] *under sanction of an act of congress, to give discharges in one State a full operation in the other. Thus, then, the inference which we are called upon to make will be found not to rest

upon any actual cession of State power, but upon the creation of a new power which no State ever pretended to possess; a power which, so far from necessarily diminishing or impairing the State power over the subject, might find its full exercise in simply recognizing as valid, in every State, all discharges which shall be honestly obtained under the existing laws of any State.

Again: the inference proposed to be deduced from this grant to congress will be found much broader than the principle in which the deduction is claimed. For, in this, as in many other instances in the constitution, the grant implies only the right to assume and exercise a power over the subject. Why, then, should the State powers cease before congress shall have acted upon the subject? or why should that be converted into a present and absolute relinquishment of power which is, in its nature, merely potential, and dependent on the discretion of congress whether, and when, to enter on the exercise of a power that may supersede it?

Let any one turn his eye back to the time when this grant was made, and say if the situation of the people admitted of an abandonment of a power so familiar to the jurisprudence of every State; so universally sustained in its reasonable exercise by the opinion and practice of mankind, and so vitally important to a people overwhelmed in debt, and urged to enterprise by the activity of mind that is generated by revolutions and free governments.

I will with confidence affirm that the constitution had never been adopted, had it then been imagined that this question would ever have been made, or that the exercise of this power in the States should ever have depended upon the views of the tribunals to which that constitution was about to give existence. The argument proposed to be drawn from a comparison of this power with that of congress over naturalization, is not a fair one, for the cases are not parallel; and if they were, it is by no means settled that the States would have been precluded from this power, *if con- [*277] gress had not assumed it. But, admitting, *argumenti gratia*, that they would, still, there are considerations bearing upon the one power which have no application to the other. Our foreign intercourse being exclusively committed to the general government, it is peculiarly their province to determine who are entitled to the privileges of American citizens and the protection of the American government. And the citizens of any one State being entitled by the constitution to enjoy the rights of citizenship in every other State, that fact creates an interest in this particular in each other's acts, which does not exist with regard to their bankrupt laws; since state acts of naturalization would thus be extra-territorial in their oper-

ation, and have an influence on the most vital interests of other States.

On these grounds, state laws of naturalization may be brought under one of the four heads or classes of powers precluded to the States, to wit: that of incompatibility; and on this ground alone, if any, could the States be debarred from exercising this power, had congress not proceeded to assume it. There is, therefore, nothing in that argument.

The argument deduced from the commercial character of bankrupt laws is still more unfortunate. It is but necessary to follow it out, and the inference, if any, deducible from it, will be found to be direct and conclusive in favor of the State rights over this subject. For if, in consideration of the power vested in congress over foreign commerce and the commerce between the States, it was proper to vest a power over bankruptcies that should pervade the States; it would seem that, by leaving the regulation of internal commerce in the power of the States, it became equally proper to leave the exercise of this power within their own limits unimpaired.

With regard to the universal understanding of the American people on this subject, there cannot be two opinions. If ever contemporaneous exposition and the clear understanding of the contracting parties, or of the legislating power, (it is no matter in which light it be considered,) could be resorted to as the means of expounding an instrument, the continuing and unimpaired existence of this power in the States ought never to have been controverted. Nor [*278] was it *controverted until the repeal of the bankrupt act of 1800,[1] or until a state of things arose in which the means of compelling a resort to the exercise of this power by the United States became a subject of much interest. Previously to that period, the States remained in the peaceable exercise of this power, under circumstances entitled to great consideration. In every State in the Union was the adoption of the constitution resisted by men of the keenest and most comprehensive minds; and if an argument such as this, so calculated to fasten on the minds of a people jealous of state rights, and deeply involved in debt, could have been imagined, it never would have escaped them. Yet nowhere does it appear to have been thought of; and, after adopting the constitution in every part of the Union, we find the very framers of it everywhere among the leading men in public life, and legislating or adjudicating under the most solemn oath to maintain the constitution of the United States, yet nowhere imagining that in the exercise of this power they violated their oaths, or transcended their rights. Everywhere,

[1] 2 Stats. at Large, 19.

too, the principle was practically acquiesced in, that taking away the power to pass a law on a particular subject was equivalent to a repeal of existing laws on that subject. Yet in no instance was it contended that the bankrupt laws of the States were repealed, while those on navigation, commerce, the admiralty jurisdiction, and various others, were at once abandoned without the formality of a repeal. With regard to their bankrupt or insolvent laws, they went on carrying them into effect, and abrogating, and reënacting them, without a doubt of their full and unimpaired power over the subject. Finally, when the bankrupt law of 1800 was enacted, the only power that seemed interested in denying the right to the States, formally pronounced a full and absolute recognition of that right. It is impossible for language to be more full and explicit on the subject than is the sixth section of this act of congress. It acknowledges both the validity of existing laws and the right of passing future laws. The practical construction given by that act to the constitution is precisely this, that it amounts only to a right to assume the power to legislate on the subject, and, therefore, abrogates or suspends the existing laws only so far as they may * clash with [*279] the provisions of the act of congress. This construction was universally acquiesced in, for it was that on which there had previously prevailed but one opinion from the date of the constitution.

Much alarm has been expressed respecting the inharmonious operation of so many systems, all operating at the same time. But I must say, that I cannot discover any real ground for these apprehensions. Nothing but a future operation is here contended for; and nothing is easier than to avoid those rocks and quicksands which are visible to all. Most of the dangers are imaginary; for the interests of each community, its respect for the opinion of mankind, and a remnant of moral feeling, which will not cease to operate in the worst of times, will always present important barriers against the gross violation of principle. How is the general government itself made up, but of the same materials which separately make up the governments of the States?

It is a very important fact, and calculated to dissipate the fears of those who seriously apprehend danger from this quarter, that the powers assumed and exercised by the States over this subject did not compose any part of the grounds of complaint by Great Britain, when negotiating with our government on the subject of violations of the treaty of peace. Nor is it immaterial, as an historical fact, to show the evils against which the constitution really intended to provide a remedy. Indeed, it is a solecism to suppose that the permanent laws of any government, particularly those which relate to

the administration of justice between individuals, can be radically unequal, or even unwise. It is scarcely ever so in despotic governments, much less in those in which the good of the whole is the predominating principle. The danger to be apprehended is from temporary provisions and desultory legislation; and this seldom has a view to future contracts.

At all events, whatever be the degree of evil to be produced by such laws, the limits of its action are necessarily confined to the territory of those who inflict it. The ultimate object in denying to the States this power would seem to be, to give the evil a wider range, if it be one, by extending the benefit of discharges over the [* 280] whole of the Union. * But it is impossible to suppose that the framers of the constitution could have regarded the exercise of this power as an evil in the abstract, else they would hardly have engrafted it upon that instrument which was to become the great safeguard of public justice and public morals.

And, had they been so jealous of the exercise of this power in the States, it is not credible that they would have left unimpaired those unquestionable powers over the administration of justice which the States do exercise, and which, in their immoral exercise, might leave to the creditor the mere shadow of justice. The debtor's person, no one doubts, may be exempted from execution. But there is high precedent for exempting his lands; and public feeling would fully sustain an exemption of his slaves. What is to prevent the extension of exemption, until nothing is left but the mere mockery of a judgment, without the means of enforcing its satisfaction?

But it is not only in their execution laws that the creditor has been left to the justice and honor of the States for his security. Every judiciary in the Union owes its existence to some legislative act; what is to prevent a repeal of that act? and then, what becomes of his remedy, if he has not access to the courts of the Union? Or what is to prevent the extension of the right to imparl? of the time to plead? of the interval between the sittings of the state courts? Where is the remedy against all this? and why were not these powers taken also from the States, if they could not be trusted with the subordinate and incidental power here denied them? The truth is, the convention saw all this, and saw the impossibility of providing an adequate remedy for such mischiefs, if it was not to be found, ultimately, in the wisdom and virtue of the state rulers, under the salutary control of that republican form of government which it guarantees to every State. For the foreigner and the citizens of other States, it provides the safeguard of a tribunal which

cannot be controlled by state laws in the application of the remedy; and, for the protection of all, was interposed that oath which it requires to be administered to all the public functionaries, as well of the States as the United States. It may be called the ruling principle of *the constitution, to interfere as little as [*281] possible between the citizen and his own state government; and hence, with a few safeguards of a very general nature, the executive, legislative, and judicial functions of the States are left as they were, as to their own citizens, and as to all internal concerns. It is not pretended that this discharge could operate upon the rights of the citizen of any other State, unless his contract was entered into in the State that gave it, or unless he had voluntarily submitted himself to the *lex fori* of the State before the discharge; in both which instances he is subjected to its effects by his own voluntary act.

For these considerations, I pronounce the exclusive power of congress over the relief of insolvents untenable, and the dangers apprehended from the contrary doctrine unreal.

We will next inquire whether the States are precluded from the exercise of this power by that clause in the constitution which declares that no State shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

This law of the State of New York is supposed to have violated the obligation of a contract, by releasing Ogden from a debt which he had not satisfied; and the decision turns upon the question, first, in what consists the obligation of a contract? and, secondly, whether the act of New York will amount to a violation of that obligation, in the sense of the constitution?

The first of these questions has been so often examined and considered, in this and other courts of the United States, and so little progress has yet been made in fixing the precise meaning of the words "obligation of a contract," that I should turn in despair from the inquiry, were I not convinced that the difficulties the question presents are mostly factitious, and the result of refinement and technicality; or of attempts at definition, made in terms defective, both in precision and comprehensiveness. Right or wrong, I come to my conclusion on their meaning, as applied to executory contracts, the subject now before us, by a simple and short-handed exposition.

Right and obligation are considered, by all ethical writers, *as correlative terms. Whatever I, by my contract, give [*282] another a right to require of me, I, by that act, lay myself under an obligation to yield or bestow. The obligation of every contract will then consist of that right or power over my will or

actions, which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three; an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The constitution was framed for society, and an advanced state of society, in which, I will undertake to say, that all the contracts of men receive a relative, and not a positive interpretation; for the rights of all must be held and enjoyed in subserviency to the good of the whole. The State construes them, the State applies them, the State controls them, and the State decides how far the social exercise of the rights they give us over each other can be justly asserted. I say the social exercise of these rights; because, in a state of nature, they are asserted over a fellow-creature, but in a state of society, over a fellow-citizen. Yet, it is worthy of observation how closely the analogy is preserved between the assertion of these rights in a state of nature and a state of society, in their application to the class of contracts under consideration.

Two men, A and B, having no previous connection with each other, (we may suppose them even of hostile nations,) are thrown upon a desert island. The first, having had the good fortune to procure food, bestows a part of it upon the other, and he contracts to return an equivalent in kind. It is obvious here that B subjects himself to something more than the moral obligation of his contract, and that the law of nature and the sense of mankind would justify A in resorting to any means in his power to compel a compliance with this contract. But if it should appear that B, by sickness, by accident, or circumstances beyond human control, however superinduced, could not possibly comply with his contract, the decision would be otherwise, and the exercise of compulsory power over B would be followed with the indignation of mankind. He
[* 283] has carried the power conferred * on him over the will or actions of another beyond their legitimate extent, and done injustice in his turn. "Summum jus est summa injuria."

The progress of parties, from the initiation to the consummation of their rights, is exactly parallel to this in a state of society. With this difference, that in the concoction of their contracts, they are controlled by the laws of the society of which they are members; and for the construction and enforcement of their contracts, they rest upon the functionaries of its government. They can enter into no contract which the laws of that community forbid, and the validity and effect of their contracts is what the existing laws give to them.

The remedy is no longer retained in their own hands, but surrendered to the community, to a power competent to do justice, and bound to discharge towards them the acknowledged duties of government to society, according to received principles of equal justice. The public duty, in this respect, is the substitute for that right which they possessed in a state of nature, to enforce the fulfilment of contracts; and if, even in a state of nature, limits were prescribed, by the reason and nature of things, to the exercise of individual power in enacting the fulfilment of contracts, much more will they be in a state of society. For it is among the duties of society to enforce the rights of humanity; and both the debtor and the society have their interests in the administration of justice, and in the general good; interests, which must not be swallowed up and lost sight of while yielding attention to the claim of the creditor. The debtor may plead the visitations of providence, and the society has an interest in preserving every member of the community from despondency — in relieving him from a hopeless state of prostration, in which he would be useless to himself, his family, and the community. When that state of things has arrived in which the community has fairly and fully discharged its duties to the creditor, and in which, pursuing the debtor any longer would destroy the one without benefiting the other, must always be a question to be determined by the common guardian of the rights of both; and in this originates the power exercised by governments in favor of insolvents. * It grows out [* 284] of the administration of justice, and is a necessary appendage to it.

There was a time when a different idea prevailed, and then it was supposed that the rights of the creditor required the sale of the debtor and his family. A similar notion now prevails on the coast of Africa, and is often exercised there by brute force. It is worthy only of the country in which it now exists, and of that state of society in which it once originated and prevailed.

"Lex non cogit ad impossibilia," is a maxim applied by law to the contracts of parties in a hundred ways. And where is the objection, in a moral or political view, to applying it to the exercise of the power to relieve insolvents? It is in analogy with this maxim that the power to relieve them is exercised; and if it never was imagined that, in other cases, this maxim violated the obligation of contracts, I see no reason why the fair, ordinary, and reasonable exercise of it, in this instance, should be subjected to that imputation.

If it be objected to these views of the subject that they are as applicable to contracts prior to the law as to those posterior to it, and, therefore, inconsistent with the decision in the case of Sturges *v.*

Crowninshield, my reply is, that I think this no objection to its correctness. I entertained this opinion then, and have seen no reason to doubt it since. But, if applicable to the case of prior debts, *multo fortiori*, will it be so to those contracted subsequent to such a law; the posterior date of the contract removes all doubt of its being in the fair and unexceptionable administration of justice that the discharge is awarded.

I must not be understood here as reasoning upon the assumption that the remedy is grafted into the contract. I hold the doctrine untenable, and infinitely more restrictive on state power than the doctrine contended for by the opposite party. Since, if the remedy enters into the contract, then the States lose all power to alter their laws for the administration of justice. Yet, I freely admit that the remedy enters into the views of the parties when contracting; that the constitution pledges the States to every creditor for the [* 285] full, and fair, and candid exercise of state power to the *ends of justice, according to its ordinary administration, uninfluenced by views to lighten, or lessen, or defer the obligation to which each contract fairly and legally subjects the individual who enters into it. Whenever an individual enters into a contract, I think his assent is to be inferred to abide by those rules in the administration of justice which belong to the jurisprudence of the country of the contract. And, when compelled to pursue his debtor in other States, he is equally bound to acquiesce in the law of the forum to which he subjects himself. The law of the contract remains the same everywhere, and it will be the same in every tribunal; but the remedy necessarily varies, and with it the effect of the constitutional pledge, which can only have relation to the laws of distributive justice known to the policy of each State severally. It is very true that inconveniences may occasionally grow out of irregularities in the administration of justice by the States. But the citizen of the same State is referred to his influence over his own institutions for his security, and the citizens of the other States have the institutions and powers of the general government to resort to. And this is all the security the constitution ever intended to hold out against the undue exercise of the power of the States over their own contracts, and their own jurisprudence.

But, since a knowledge of the laws, policy, and jurisprudence of a State is necessarily imputed to every one entering into contracts within its jurisdiction, of what surprise can he complain, or what violation of public faith, who still enters into contracts under that knowledge? It is no reply to urge that, at the same time knowing of the constitution, he had a right to suppose the discharge void and

inoperative, since this would be but speculating on a legal opinion, in which, if he proves mistaken, he has still nothing to complain of but his own temerity, and concerning which, all that come after this decision, at least, cannot complain of being misled by their ignorance or misapprehensions. Their knowledge of the existing laws of the State will henceforward be unqualified, and was so, in the view of the law, before this decision was made.

It is now about twelve or fourteen years since I was called upon, on my circuit, in the case of Gell, Canonge, [* 286] and Co. *v.* L. Jacobs, to review all this doctrine. The cause was ably argued by gentlemen whose talents are well known in this capitol, and the opinions which I then formed I have seen no reason since to distrust.

It appears to me that a great part of the difficulties of the cause arise from not giving sufficient weight to the general intent of this clause in the constitution, and subjecting it to a severe literal construction, which would be better adapted to special pleadings.

By classing bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts together, the general intent becomes very apparent; it is a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property. It is true that some confusion has arisen from an opinion which seems early, and without due examination, to have found its way into this court; that the phrase, "*ex post facto*," was confined to laws affecting criminal acts alone. The fact, upon examination, will be found otherwise; for, neither in its signification or uses is it thus restricted. It applies to civil as well as to criminal acts, (1 Shep. Touch. 68, 70, 73;) and with this enlarged signification attached to that phrase, the purport of the clause would be, "that the States shall pass no law, attaching to the acts of individuals other effects or consequences than those attached to them by the laws existing at their date; and all contracts thus construed shall be enforced according to their just and reasonable purport."

But to assign to contracts, universally, a literal purport, and to exact for them a rigid literal fulfilment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction, and fulfilment of contracts, as over the form and measure of the remedy to enforce them.

As instances of the first, take the contract imputed to the drawer of a bill, or indorser of a note, with its modifications; the deviations of the law from the literal contract of the parties to a penal bond, a mortgage, a policy of insurance, bottomry bond, and various

[*287] others that might be *enumerated. And, for instances of discretion exercised in applying the remedy, take the time for which executors are exempted from suit; the exemption of members of legislatures; of judges; of persons attending courts, or going to elections; the preferences given in the marshalling of assets; sales on credit for a present debt; shutting of courts altogether against gaming debts and usurious contracts, and, above all, acts of limitation. I hold it impossible to maintain the constitutionality of an act of limitation, if the modification of the remedy against debtors, implied in the discharge of insolvents, is unconstitutional. I have seen no distinction between the cases that can bear examination.

It is in vain to say that acts of limitation appertain to the remedy only: both descriptions of laws appertain to the remedy, and exactly in the same way; they put a period to the remedy, and upon the same terms, by what has been called a tender of paper money in the form of a plea, and to the advantage of the insolvent laws, since if the debtor can pay, he has been made to pay. But the door of justice is shut in the face of the creditor in the other instance, without an inquiry on the subject of the debtor's capacity to pay. And it is equally vain to say, that the act of limitation raises a presumption of payment, since it cannot be taken advantage of on the general issue, without provision by statute; and the only legal form of a plea implies an acknowledgment that the debt has not been paid.

Yet so universal is the assent of mankind in favor of limitation acts, that it is the opinion of profound politicians that no nation could subsist without one.

The right, then, of the creditor to the aid of the public arm for the recovery of contracts, is not absolute and unlimited, but may be modified by the necessities or policy of societies. And this, together with the contract itself, must be taken by the individual, subject to such restrictions, and conditions as are imposed by the laws of the country. The right to pass bankrupt laws is asserted by every civilized nation in the world. And in no writer, I will venture to say, has it ever been suggested, that the power of annulling such contracts, universally exercised under their bankrupt or insolvent systems, involves a violation of the obligation of contracts.

[*288] *In international law, the subject is perfectly understood, and the right generally acquiesced in; and yet the denial of justice is, by the same code, an acknowledged cause of war.

But it is contended that if the obligation of a contract has relation at all to the laws which give or modify the remedy, then the obligation of a contract is ambulatory and uncertain, and will mean a

different thing in every State in which it may be necessary to enforce the contract.

There is no question that this effect follows; and yet, after this concession, it will still remain to be shown how any violation of the obligation of the contract can arise from that cause. It is a casualty well known to the creditor when he enters into the contract; and if obliged to prosecute his rights in another State, what more can he claim of that State, than that its courts shall be open to him on the same terms on which they are open to other individuals? It is only by voluntarily subjecting himself to the *lex fori* of a State, that he can be brought within the provisions of its statutes in favor of debtors; since, in no other instance, does any State pretend to a right to discharge the contracts entered into in another State. He who enters into a pecuniary contract knowing that he may have to pursue his debtor if he flees from justice, casts himself, in fact, upon the justice of nations.

It has also been urged, with an earnestness that could only proceed from deep conviction, that insolvent laws were tender laws of the worst description, and that it is impossible to maintain the constitutionality of insolvent laws that have a future operation, without asserting the right of the States to pass tender laws, provided such laws are confined to a future operation.

Yet to all this there appears to be a simple and conclusive answer. The prohibition in the constitution to make any thing but gold or silver coin a tender in payment of debts is express and universal. The framers of the constitution regarded it as an evil to be repelled without modification; they have therefore left nothing to be inferred or deduced from construction on this subject. But the contrary is the fact with regard to insolvent laws; it contains no express prohibition to pass such laws, and we are called upon here [*289] to deduce such a prohibition from a clause which is any thing but explicit, and which already has been judicially declared to embrace a great variety of other subjects. The inquiry, then, is open and indispensable in relation to insolvent laws, prospective or retrospective, whether they do, in the sense of the constitution, violate the obligation of contracts. There would be much in the argument, if there was no express prohibition against passing tender laws; but with such express prohibition the cases have no analogy. And independent of the different provisions in the constitution, there is a distinction existing between tender laws and insolvent laws, in their object and policy, which sufficiently points out the principle upon which the constitution acts upon them as several and distinct; a tender law supposes a capacity in the debtor to pay and satisfy the

debt in some way, but the discharge of an insolvent is founded in his incapacity ever to pay, which incapacity is judicially determined according to the laws of the State that passes it. The one imports a positive violation of the contract, since all contracts to pay, not expressed otherwise, have relation to payment in the current coin of the country; the other imports an impossibility that the creditor ever can fulfil the contract.

If it be urged that, to assume this impossibility, is itself an arbitrary act; that parties have in view something more than present possessions; that they look to future acquisitions; that industry, talents, and integrity are as confidently trusted as property itself; and, to release them from this liability, impairs the obligation of contracts, plausible as the argument may seem, I think the answer is obvious and incontrovertible.

Why may not the community set bounds to the will of the contracting parties in this as in every other instance? That will is controlled in the instances of gaming debts, usurious contracts, marriage, brokage bonds, and various others; and why may not the community also declare that, "look to what you will, no contract formed within the territory which we govern shall be valid as against future acquisitions;" "we have an interest in the happiness, and services, and families of this community, which shall not be [*290] superseded by individual *views?" Who can doubt the power of the State to prohibit her citizens from running in debt altogether? A measure a thousand times wiser than that impulse to speculation and ruin, which has hitherto been communicated to individuals by our public policy. And, if to be prohibited altogether, where is the limit which may not be set, both to the acts and the views of the contracting parties?

When considering the first question in this cause, I took occasion to remark on the evidence of contemporaneous exposition deducible from well known facts. Every candid mind will admit that this is a very different thing from contending that the frequent repetition of wrong will create a right. It proceeds upon the presumption that the contemporaries of the constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them; and in this point of view it is obvious that the consideration bears as strongly upon the second point in the cause as on the first. For had there been any possible ground to think otherwise, who could suppose that such men, and so many of them, acting under the most solemn oath, and generally acting rather under

a feeling of jealousy of the power of the general government than otherwise, would universally have acted upon the conviction, that the power to relieve insolvents by a discharge from the debt had not been taken from the States by the article prohibiting the violation of contracts? The whole history of the times, up to a time subsequent to the repeal of the bankrupt law, indicates a settled knowledge of the contrary.

If it be objected to the views which I have taken of this subject, that they imply a departure from the direct and literal meaning of terms, in order to substitute an artificial or complicated exposition; my reply is, that the error is on the other side, *qui hæret in literâ, hæret in cortice.* All the notions of society, particularly in their jurisprudence, are more or less artificial; our constitution nowhere speaks the language of men in a state of nature; let any one attempt a literal exposition of the phrase which immediately precedes the one under * consideration, I mean *ex post facto*, and he [* 291] will soon acknowledge a failure. Or let him reflect on the mysteries that hang around the little slip of paper which lawyers know by the title of a bail-piece. The truth is that, even compared with the principles of natural law, scarcely any contract imposes an obliagtion conformable to the literal meaning of terms. He who enters into a contract to follow the plough for the year, is not held to its literal performance, since many casualties may intervene which would release him from the obligation without actual performance. There is a very striking illustration of this principle to be found in many instances in the books; I mean those cases in which parties are released from their contracts by a declaration of war, or where laws are passed rendering that unlawful, even incidentally, which was lawful at the time of the contract. Now in both these instances, it is the government that puts an end to the contract, and yet no one ever imagined that it thereby violates the obligation of a contract.

It is, therefore, far from being true, as a general proposition, "that a government necessarily violates the obligation of a contract, which it puts an end to without performance." It is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts.

In the effort to get rid of the universal vote of mankind in favor of limitation acts, and laws against gaming, usury, marriage, brokage, buying and selling of offices, and many of the same description, we have heard it argued that, as to limitation acts, the creditor has nothing to complain of, because time is allowed him, of which, if he does not avail himself, it is his own neglect; and as to all others, there is no contract violated, because there was none ever incurred.

But it is obvious that this mode of answering the argument involves a surrender to us of our whole ground. It admits the right of the government to limit and define the power of contracting, and the extent of the creditor's remedy against his debtor; to regard other rights besides his, and to modify his rights so as not to let them override entirely the general interests of society, the interests of the community itself in the talents and services of the debtor,
[*292] the regard due to his * happiness, and to the claims of his family upon him and upon the government.

No one questions the duty of the government to protect and enforce the just rights of every individual over all within its control. What we contend for is no more than this, that it is equally the duty and right of governments to impose limits to the avarice and tyranny of individuals, so as not to suffer oppression to be exercised under the semblance of right and justice. It is true that, in the exercise of this power, governments themselves may sometimes be the authors of oppression and injustice; but, wherever the constitution could impose limits to such power, it has done so; and if it has not been able to impose effectual and universal restraints, it arises only from the extreme difficulty of regulating the movements of sovereign power; and the absolute necessity, after every effort that can be made to govern effectually, that will still exist, to leave some space for the exercise of discretion, and the influence of justice and wisdom.

THOMPSON, J. This action is founded on several bills of exchange, bearing date in September, 1806, drawn by J. Jordan, upon Ogden, the plaintiff in error, in favor of Saunders, the defendant in error. The drawer and payee, at the date of the bills, were citizens of and resident in Kentucky. Ogden was a citizen of and resident in New York, where the bills were presented and accepted by him, but were not paid when they came to maturity, and are still unpaid. Ogden sets up, in bar of this action, his discharge under the insolvent law of the State of New York, passed in April, 1801, as one of the revised laws of that State. His discharge was duly obtained, on the 19th of April, 1808, he having assigned all his property for the benefit of his creditors, and having, in all respects, complied with the laws of New York for giving relief in cases of insolvency. These proceedings, according to those laws, discharged the insolvent from all debts due at the time of the assignment, or contracted for before that time, though payable afterwards, except in some specified cases, which do not affect the present question. From this brief statement it appears that Ogden, being sued upon his acceptances of
[*293] * the bills in question, the contract was made, and to be

executed within the State of New York, and was made subsequent to the passage of the law under which he was discharged. Under these circumstances, the general question presented for decision is, whether this discharge can be set up in bar of the present suit. It is not pretended but that if the law under which the discharge was obtained, is valid, and the discharge is to have its effect according to the provisions of that law, it is an effectual bar to any recovery against Ogden. But, it is alleged that this law is void, under the prohibition in the constitution of the United States, art. 1, s. 10, which declares that "no State shall pass any law impairing the obligation of contracts." So that the inquiry here is, whether the law of New York, under which the discharge was obtained, is repugnant to this clause in the constitution; and, upon the most mature consideration, I have arrived at the conclusion that the law is not void, and that the discharge set up by the plaintiff in error is an effectual protection against any liability upon the bills in question. In considering this question, I have assumed that the point now presented is altogether undecided, and entirely open for discussion. Although several cases have been before this court which may have a bearing upon the question, yet, upon the argument, the particular point now raised has been treated by the counsel as still open for decision and so considered by the court by permitting its discussion. Although the law under which Ogden was discharged appears, by the record, to have been passed in the year 1801, yet, it is proper to notice, that this was a mere revision and reënactment of a law which was in force as early, at least, as from the year 1788, and which has continued in force from that time to the present, (except from the 3d of April, 1811, until the 14th of February, 1812,) in all its material provisions which have any bearing upon the present question. To declare a law null and void after such a lapse of time, and thereby prostrate a system which has been in operation for nearly forty years, ought to be called for by some urgent necessity, and founded upon reasons and principles scarcely admitting of doubt. In our complex system of government, we must expect that questions involving the jurisdictional limits between the general and [* 294] State governments, will frequently arise; and they are always questions of great delicacy, and can never be met without feeling deeply and sensibly impressed with the sentiment that this is the point upon which the harmony of our system is most exposed to interruption. Whenever such a question is presented for decision, I cannot better express my views of the leading principles which ought to govern this court, than in the language of the court itself, in the case of Fletcher *v.* Peck, 6 C. 128. "The question (says the court)

whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom or ever, be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligation which that station imposes. But, it is not on slight implication, and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." If such be the rule by which the examination of this case is to be governed and tried, (and that it is no one can doubt,) I am certainly not prepared to say that it is not, at least, a doubtful case, or that I feel a clear conviction that the law in question is incompatible with the constitution of the United States.

In the discussion at the bar, this has rightly been considered a question relating to the division of power between the general and State governments. And in the consideration of all such questions, it cannot be too often repeated, (although universally admitted,) or too deeply impressed on the mind, that all the powers of the general government are derived solely from the constitution; and that whatever power is not conferred by that charter, is reserved to the States respectively, or to the people. The State of New York, when the law in question was passed, (for I consider this a mere con-
[* 295] tinuation of the Insolvent Act of 1788,) was * in the due and rightful exercise of its powers as an independent government; and unless this power has been surrendered by the constitution of the United States, it still remains in the State. And in this view, whether the law in question be called a bankrupt or an insolvent law, is wholly immaterial; it was such a law as a sovereign State had a right to pass; and the simple inquiry is, whether that right has been surrendered. No difficulty arises here out of any inquiry about express or implied powers granted by the constitution. If the States have no authority to pass laws like this, it must be in consequence of the express provision, "that no State shall pass any law impairing the obligation of contracts."

It is admitted, and has so been decided by this court, that a state law discharging insolvent debtors from their contracts, entered into antecedent to the passing of the law, falls within this clause in the constitution, and is void. In the case now before the court, the contract was made subsequent to the passage of the law; and this, it is believed, forms a solid ground of distinction, whether tested by the letter or the spirit and policy of the prohibition. It was not

denied on the argument, and I presume cannot be, but that a law may be void in part and good in part; or, in other words, that it may be void, so far as it has a retrospective application to past contracts, and valid, as applied prospectively to future contracts. The distinction was taken by the court in the third circuit, in the case of Golden *v.* Prince, 5 Hall's L. J. 502, and which, I believe, was the first case that brought into discussion the validity of a state law analogous to the one now under consideration. It was there held that the law was unconstitutional in relation to that particular case, because it impaired the obligation of the contract, by discharging the debtor from the payment of his debts due or contracted for before the passage of the law. But it was admitted that a law prospective in its operation, under which a contract afterwards made might be avoided in a way different from that provided by the parties, would be clearly constitutional. And how is this distinction to be sustained, except on the ground that contracts are deemed to be made in reference to the existing law, and to be governed, *regulated, and controlled by its provisions? As [*296] the question before the court was the validity of an insolvent law, which discharged the debtor from all contracts, the distinction must have been made in reference to the operation of the discharge upon contracts made before, and such as were made after the passage of the law, and is, therefore, a case bearing directly upon the question now before the court. That the power given by the constitution to congress, to establish uniform laws on the subject of bankruptcies throughout the United States, does not withdraw the subject entirely from the States, is settled by the case of Sturges *v.* Crowninshield, 4 W. 191. It is there expressly held that "until the power to pass uniform laws on the subject of bankruptcies is exercised by congress, the States are not forbidden to pass a bankrupt law, provided it contain no principle which violates the 10th section of the first article of the constitution of the United States." And this case also decides that the right of the States to pass bankrupt laws is not extinguished, but is only suspended by the enactment of a general bankrupt law by congress, and that a repeal of that law removes disability to the exercise of the power by the States; so that the question now before the court, is narrowed down to the single inquiry, whether a state bankrupt law, operating prospectively upon contracts made after its enactment, impairs the obligation of such contract, within the sense and meaning of the constitution of the United States.

This clause in the constitution has given rise to much discussion, and great diversity of opinion has been entertained as to its true

interpretation. Its application to some cases may be plain and palpable, to others more doubtful. But, so far as relates to the particular question now under consideration, the weight of judicial opinions in the state courts is altogether in favor of the constitutionality of the law, so far as my examination has extended. And, indeed, I am not aware of a single contrary opinion. 13 Mass. 1; 16 Johns. 233; 7 Johns. Ch. 299; 5 Binn. 264; 5 Hall's L. J. 520, 6th ed. 475; Niles's Reg. 15th of September, 1821. Townsend *v.* Townsend.

[*297] *true import of the clause "no State shall pass any law impairing the obligation of contracts," the inquiries which seem naturally to arise are, what is a contract, what its obligation, and what may be said to impair it? As to what constitutes a contract, no diversity of opinion exists; all the elementary writers on the subject, sanctioned by judicial decisions, consider it briefly and simply an agreement in which a competent party undertakes to do, or not to do, a particular thing; but all know that the agreement does not always, nay, seldom, if ever, upon its face, specify the full extent of the terms and conditions of the contract; many things are necessarily implied, and to be governed by some rule not contained in the agreement; and this rule can be no other than the existing law when the contract is made or to be executed. Take, for example, the familiar case of an agreement to pay a certain sum of money, with interest. The amount, or rate of such interest, is to be ascertained by some standard out of the agreement, and the law presumes the parties meant the common rate of interest established in the country where the contract was to be performed. This standard is not looked to for the purpose of removing any doubt or ambiguity arising on the contract itself, but to ascertain the extent of its obligation; or to put a case more analogous, suppose a statute should declare generally, that all contracts for the payment of money should bear interest after the day of payment fixed in the contract, and a note, where such law was in force, should be made payable in a given number of days after date. Such note would surely draw interest from the day it became payable, although the note upon its face made no provision for interest; and the obligation of the contract to pay the interest would be as complete and binding as to pay the principal; but such would not be its operation without looking out of the instrument itself, to the law which created the obligation to pay interest. The same rule applies to contracts of every description; and parties must be understood as making their contracts with reference to existing laws, and impliedly assenting that such contracts are to be construed, governed, and

controlled, by such laws. Contracts absolute, and unconditional, *upon their face, are often considered subject to an [*298] implied condition which the law establishes as applicable to such cases. Suppose a state law should declare that in all conveyances thereafter to be made, of real estate, the land should be held as security for the payment of the consideration money, and liable to be sold, in case default should be made in payment: would such a law be unconstitutional? And yet it would vary the contract from that which was made by the parties, if judged of by the face of the deed alone, and would be making a contract conditional, which the parties had made absolute, and would certainly be impairing such contract, unless it was deemed to have been made subject to the provisions of such law, and with reference thereto, and that the law was impliedly adopted as forming the obligation and terms of the contract. The whole doctrine of the *lex loci* is founded on this principle.

The language of the court, in the third circuit, in the case of Camfranque *v.* Burnell, 1 Washington C. C. 341, is very strong on this point. Those laws, say the court, which in any manner affect the contract, whether in its construction, the mode of discharging it, or which control the obligation which the contract imposes, are essentially incorporated with the contract itself. The contract is a law which the parties impose upon themselves, subject, however, to the paramount law—the law of the country where the contract is made. And when to be enforced by foreign tribunals such tribunals aim only to give effect to the contracts, according to the laws which gave them validity. So, also, in this court, in the case of Renner *v.* The Bank of Columbia, 9 W. 586, the language of the court is to the same effect, and shows that we may look out of the contract, to any known law or custom, with reference to which the parties may be presumed to have contracted, in order to ascertain their intention, and the legal and binding force and obligation of their contract. The Bank of Columbia *v.* Okley, 4 W. 235, is another case recognizing the same principle. And in the case of Dartmouth College *v.* Woodward, 4 W. 695, it is well observed by one of the judges of this court, "that all contracts recognized as valid in any *country, obtain their obligation and [*299] construction *jure loci contractus.*" And this doctrine is universally recognized, both in the English and American courts.

If contracts are not made with reference to existing laws, and to be governed and regulated by such laws, the agreement of parties, under the extended construction now claimed for this clause in the constitution, may control State laws on the subject of contracts alto-

gether. A parol agreement for the sale of land is a contract, and if the agreement alone makes the contract, and it derives its obligation solely from such agreement, without reference to the existing law, it would seem to follow that any law which had declared such contract void, or had denied a remedy for breach thereof, would impair its obligation. A construction involving such consequences is certainly inadmissible. Any contract not sanctioned by existing laws creates no civil obligation; and any contract discharged in the mode and manner provided by the existing law where it was made, cannot, upon any just principles of reasoning, be said to impair such contract.

It will, I believe, be found on examination that the course of legislation in some of the States, between debtor and creditor, which formed the grounds of so much complaint, and which probably gave rise to this prohibition in the constitution, consisted principally, if not entirely, of laws having a retrospective operation upon antecedent debts.

If a contract does not derive its obligation from the positive law of the country where it is made, where is to be found the rule that such obligation does not attach until the contracting party has attained a certain age? In what code of natural law or in what system of universal law, out of which it is said, at the bar, spring the eternal and unalterable principles of right and of justice, will be found a rule that such obligation does not attach so as to bind a party under the age of twenty-one years? No one will pretend that a law exonerating a party from contracts entered into before arriving at such age, would be invalid. And yet it would impair the obligation of the contract, if such obligation is derived from any other source than the existing law of the place where made.

[*300] Would it not be within the *legitimate powers of a State legislature to declare prospectively that no one should be made responsible upon contracts entered into before arriving at the age of twenty-five years. This, I presume, cannot be doubted. But to apply such a law to past contracts, entered into when twenty-one years was the limit, would clearly be a violation of the obligation of the contract. No such distinction, however, could exist, unless the obligation of the contract grows out of the existing law, and with reference to which the contract must be deemed to have been made.

The true import of the term obligation, as used in the constitution, may admit of some doubt. That it refers to the civil, or legal, and not moral obligation, is admitted by all. But whether the remedy upon the contract is entirely excluded from the operation of this provision, is a point on which some diversity of opinion has been entertained.

That it is not intended to interfere with or limit state legislation,

in relation to the remedy, in the ordinary prosecution of suits, no one can doubt. And, indeed, such a principle is indispensable to facilitate commercial intercourse between the citizens or subjects of different governments, and is sanctioned by all civilized nations; and if, according to the language of these cases, this principle extends to the obligation, as well as to the construction of contracts, it would seem to follow, as a necessary conclusion, that it must embrace all the consequences growing out of the laws of the country where the contract is made; for it is the law which creates the obligation; and whenever, therefore, the *lex loci* provides for the dissolution of the contract in any prescribed mode, the parties are presumed to have acted subject to such contingency. And hence, in the English courts, wherever the operation of a foreign discharge under a bankrupt law has been brought under consideration, they have given to it the same effect that it would have had in the country where the contract was made. And the same rule has been recognized and adopted in the courts of this country almost universally, where the question has arisen. But whether a law might not so change the nature and extent of existing remedies, and thereby so materially impair the right, as to fall within the scope * of this prohibition, if [*301] it extended to remedies upon antecedent contracts, is by no means clear. If the law, whatever it may be, relating to the remedy, has a prospective operation only, no objection can arise to it under this clause in the constitution. It is a question that must rest in the sound discretion of the State legislature. But men, when entering into contracts, can hardly be presumed entirely regardless of the remedy which the law provides in case of a breach of the contract; and the means of obtaining satisfaction for such breach enters essentially into consideration in making the contract. If, at the time of making the contract, it be known that the person only of the debtor, and not his property, or his personal property only, and not his lands, or a certain part of either, is to be resorted to for satisfaction, no ground of complaint can exist, the contract having been made with full knowledge of all these things; but if, at the time the contract is made, not only the person, but all the property, both real and personal, of the debtor, might be resorted to for satisfaction, and a law should be passed placing beyond the reach of the creditor the whole or the principal part of the debtor's property, it would be difficult to sustain the constitutionality of such a law. The statute of limitations is conceded to relate to the remedy. Suppose, when a contract was made, the limitation was six years, and it should be reduced to six months, or any shorter period, and applied to antecedent contracts, would it not be repugnant to the constitution? But if the legislature

of a State should choose to adopt, prospectively, six months as the limitation, who could question the authority so to do? And suppose further that the unconstitutionality of the law in question is admitted, could the State of New York pass a law limiting the right of recovery against any insolvent who had been duly discharged according to the provisions of the insolvent act, to ten days from the passage of such law? And yet this would be a statute of limitation, and affect the remedy only. The law now in question is nothing more than taking away all remedy; and whether it be the whole, or some material part thereof, would seem to differ in degree only, and not in principle; and if to have a retrospective operation,
[* 302] *might well be considered as falling within the spirit and policy of the prohibition.

In the case of Sturges *v.* Crowninshield, 4 W. 122, the court, in explaining the meaning of the terms "obligation of a contract," say: "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract." That is, as I understand it, the law of the contract forms its obligation; and if so, the contract is fulfilled, and its obligation discharged by complying with whatever the existing law required in relation to such contract; and it would seem to me to follow, that if the law, looking to the contingency of the debtor's becoming unable to pay the whole debt, should provide for his discharge on payment of a part, this would enter into the law of the contract, and the obligation to pay would, of course, be subject to such contingency.

It is unnecessary, however, on the present occasion, to attempt to draw, with precision, the line between the right and the remedy, or to determine whether the prohibition in the constitution extends to the former and not to the latter, or whether, to a certain extent, it embraces both; for the law in question strikes at the very root of the cause of action, and takes away both right and remedy, and the question still remains, does the prohibition extend to a state bankrupt or insolvent law, like the one in question, when applied to contracts entered into subsequent to its passage? Whether this is technically a bankrupt or an insolvent law is of little importance. Its operation, if valid, is to discharge the debtor absolutely from all future liability on surrendering up his property, and, in that respect, is a bankrupt law, according to the universal understanding in England, where a bankrupt system is in operation. It is not, however, limited to traders, but extends to every class of citizens; and, in this respect, is more analogous to the English insolvent laws, which only authorize the discharge of the debtor from imprisonment.

If this provision in the constitution was unambiguous, and its meaning entirely free from doubt, there would be no door left open for construction, or any proper ground upon * which [* 303] the intention of the framers of the constitution could be inquired into; this court would be bound to give to it its full operation, whatever might be the views entertained of its expediency. But the diversity of opinion entertained of its construction, will fairly justify an inquiry into the intention, as well as the reason and policy of the provision; all which, in my judgment, will warrant its being confined to laws affecting contracts made antecedent to the passage of such laws. Such would appear to be the plain and natural interpretation of the words, "No State shall pass any law impairing the obligation of contracts."

The law must have a present effect upon some contract in existence, to bring it within the plain meaning of the language employed. There would be no propriety in saying that a law impaired, or in any manner whatever modified or altered, what did not exist. The most obvious and natural application of the words themselves, is to laws having a retrospective operation upon existing contracts; and this construction is fortified by the associate prohibitions, "No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The first two are confessedly restricted to retrospective laws, concerning crimes and penalties affecting the personal security of individuals. And no good reason is perceived why the last should not be restricted to retrospective laws, relating to private rights growing out of the contracts of parties. The one provision is intended to protect the person of the citizen from punishment criminally for any act not unlawful when committed; and the other to protect the rights of property, as secured by contracts sanctioned by existing laws. No one supposes that a state legislature is under any restriction in declaring, prospectively, any acts criminal which its own wisdom and policy may deem expedient. And why not apply the same rule of construction and operation to the other provision relating to the rights of property? Neither provision can strictly be considered as introducing any new principle, but only for greater security and safety to incorporate into this charter provisions admitted by all to be among the first principles of our government. No state court would, I presume, sanction and enforce an *ex post facto* law, if no * such prohibition was contained in the constitu- [* 304] tion of the United States; so, neither would retrospective laws, taking away vested rights, be enforced. Such laws are repugnant to those fundamental principles upon which every just system of laws is founded. It is an elementary principle, adopted and sanc-

tioned by the courts of justice in this country and in Great Britain, whenever such laws have come under consideration, and yet retrospective laws are clearly within this prohibition. It is, therefore, no objection to the view I have taken of this clause in the constitution, that the provision was unnecessary. The great principle asserted, no doubt, is, as laid down by the court in Sturges *v.* Crowninshield, the inviolability of contracts; and this principle is fully maintained by confining the prohibition to laws affecting antecedent contracts. It is the same principle, we find, contemporaneously, 13th July, 1787, 1 L. U. S. 475, asserted by the old congress, in an ordinance for the government of the territory of the United States northwest of the River Ohio. By one of the fundamental articles it is provided that, "in the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have force in the territory, that shall in any manner whatever interfere with or affect private contracts or engagements, *bonâ fide*, and without fraud, previously made," thereby pointedly making a distinction between laws affecting contracts antecedently and subsequently made; and such a distinction seems to me to be founded upon the soundest principles of justice, if there is any thing in the argument that contracts are made with reference to, and derive their obligation from, the existing law.

That the prohibition upon the States to pass laws impairing the obligation of contracts is applicable to private rights merely, without reference to bankrupt laws, was evidently the understanding of those distinguished commentators on the constitution who wrote the Federalist. In the 44th number of that work, p. 281, it is said that "bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former [* 305] are expressly prohibited by the declarations prefixed * to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional defences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights." Had it been supposed that this restriction had for its object the taking from the States the right of passing insolvent laws, even when they went to discharge the contract, it is a little surprising that no intimation of its application to that subject should be found in these commentaries upon the constitution. And it is still more surprising that if it had been thought susceptible of any such interpretation, that no objection should have

been made in any of the States to the constitution on this ground, when the ingenuity of man was on the stretch in many States to defeat its adoption; and particularly in the State of New York, where the law now in question was in full force at the very time the state convention was deliberating upon the adoption of the constitution. But if the prohibition is confined to retrospective laws, as it naturally imports, it is not surprising that it should have passed without objection, as it is the assertion of a principle universally approved.

It was pressed upon the court with great confidence, and as it struck me at the time with much force, that if this restriction could not reach laws existing at the time the contract was made, state legislatures might evade the prohibition (immediately preceding) to make any thing but gold and silver a tender in payment of debts, by making the law prospective in its operation, and applicable to contracts thereafter to be made. But on reflection, I think, no such consequences are involved. When we look at the whole clause in which these restrictions are contained, it will be seen that the subjects embraced therein are evidently to be divided into two classes; the one of a public and national character, the power over which is entirely taken away from the States; and the other relating to private and personal rights, upon which the States may legislate under the restrictions specified. The former are, "no State shall enter into any treaty, alliance, or confederation, grant * letters of marque and reprisal, coin money, emit bills of credit." Thus far there can be no question that they relate to powers of a general and national character. The next in order is, or "make any thing but gold and silver a tender in payment of debts;" this is founded upon the same principles of public and national policy, as the prohibition to coin money and emit bills of credit, and is so considered in the commentary on this clause in the number of The Federalist I have referred to. It is there said, the power to make anything but gold and silver a tender in payment of debts, is withdrawn from the States, on the same principles with that of issuing a paper currency. All these prohibitions, therefore, relate to powers of a public nature, and are general and universal in their application, and inseparably connected with national policy. The subject-matter is entirely withdrawn from state authority and state legislation. But the succeeding prohibitions are of a different character; they relate to personal security and private rights, namely, or "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The subject-matter of such laws is not withdrawn from the States; but the legislation thereon must be under the restriction therein imposed. States may legislate on the subject of contracts, but the

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laws must not impair the obligation of such contracts. A tender of payment necessarily refers to the time when the tender is made, and has no relation to the time when the law authorizing it shall be passed, or when the debt was contracted. The prohibition is, therefore, general and unlimited in its application. It has been urged in argument, that this prohibition to the States to pass laws impairing the obligation of contracts, had in view an object of great national policy, connected with the power to regulate commerce; that the leading purpose was to take from the States the right of passing bankrupt laws. And to illustrate and enforce this position, this clause has been collated with that which gives to congress the power of passing uniform laws on the subject of bankruptcies; and by transposition of the clause, the constitution is made to read, congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States; but no [*307] State * shall pass any law impairing the obligation of contracts; and this prohibition is made to mean, no State shall pass any bankrupt law.

No just objection can be made to this collocation, if the grant of the power to congress, and the prohibition in question to the States, relate to the same subject-matter, namely, bankrupt laws. But it appears to me very difficult to maintain this proposition. It is, in the first place, at variance with the decision in Sturges *v.* Crowninshield, where it is held that this power is not taken from the States absolutely, but only in a limited and modified sense. And in the next place, it is not reasonable to suppose that a denial of this power to the States would have been couched in such ambiguous terms. If, as has been contended, the giving to congress the exclusive power to pass bankrupt laws was the great and leading object of this prohibition, and the preservation of private rights followed only as an incident of minor importance, it is difficult to assign any satisfactory reason, why the denial of the power to the States was not expressed in plain and unambiguous terms, namely, no State shall pass any bankrupt law. This would have been a more natural, and, certainly, a less doubtful form of expression; and, besides, if the object was to take from the States altogether the right of passing bankrupt laws, or insolvent laws having the like operation, why did not the denial of the power extend also to naturalization laws? The grant of the power to congress on this subject, is contained in the same clause, and substantially in the same words: "To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." If the authority of congress on the subject of naturalization is exclusive, from the

nature of the power, why is it not, also, with respect to bankruptcies? And if, in the one case, the denial of the power to the States was necessary, it was equally so in the other. I cannot think, therefore, that the prohibition to pass laws impairing the obligation of contracts, had any reference to a general system of bankrupt or insolvent laws. Such a system, established by the sovereign legislative power of the general or state governments, cannot, in any just sense, be said to * impair the obligation of con- [* 308] tracts. In every government of laws there must be a power somewhere to regulate civil contracts; and where, under our system, is that power vested? It must be either in the general or state governments. There is certainly no such power granted to the general government, and all power not granted is reserved to the States. The whole subject, therefore, of the regulation of contracts must remain with the States, and be governed by their laws respectively; and to deny to them the right of prescribing the terms and conditions upon which persons shall be bound by their contracts thereafter made, is imposing upon the States a limitation, for which I find no authority in the constitution; and no contract can impose a civil obligation beyond that prescribed by the existing law when the contract was made; nor can such obligation be impaired by controlling and discharging the contract according to the provisions of such law. Suppose a contract for the payment of money should contain an express stipulation by the creditor to accept a proportional part, in case the debtor should become insolvent, and to discharge the contract, can there be a doubt that such contract would be enforced? And what is the law in question but such contract, when applied to the undertaking of Ogden by accepting these bills. It is no strained construction of the transaction to consider the contract and the law inseparable, when judging of the obligation imposed upon the debtor; and, if so, the undertaking was conditional, and the holder of the bills agreed to accept a part in case of the inability of the acceptor, by reason of his insolvency, to pay the whole.

The unconstitutionality of this law is said to arise from its exempting the property of the insolvent, acquired after his discharge, from the payment of his antecedent debts. A discharge of the person of the debtor is admitted to be no violation of the contract. If this objection is well founded, it must be on the ground that the obligation of every contract attaches upon the property of the debtor, and any law exonerating it violates this obligation. I do not mean that the position implies a lien, by way of mortgage or pledge, on any specific property, but that all the property which a

[* 309] debtor has, when called upon for payment, is liable to * be taken in execution to satisfy the debt, and that a law releasing any portion of it impairs the obligation of the contract. The force and justice of this position, when applied to contracts existing at the time the law is passed, is not now drawn in question. But its correctness, when applied to contracts thereafter made, is denied. The mode, and manner, and the extent to which property may be taken in satisfaction of debts, must be left to the sound discretion of the legislature, and regulated by its views of policy and expediency, in promoting the general welfare of the community, subject to such regulation. It was the policy of the common law, under the feudal system, to exempt lands altogether from being seized and applied in satisfaction of debts; not even possession could be taken from the tenant. There can be no natural right growing out of the relation of debtor and creditor, that will give the latter an unlimited claim upon the property of the former. It is a matter entirely for the regulation of civil society; nor is there any fundamental principle of justice growing out of such relation, that calls upon government to enforce the payment of debts to the uttermost farthing which the debtor may possess; and that the modification and extent of such liability is a subject within the authority of state legislation, seems to be admitted by the uninterrupted exercise of it. I have not deemed it necessary to look into the statute books of all the States on this subject, but think it may be safely affirmed that in most, if not all the States, some limitation of the right of the creditor over the property of the debtor has been established. In New York, various articles of personal property are exempted from execution. In Rhode Island, real estate cannot at all be taken on judicial process, for satisfaction of a debt, so long as the body of the debtor is to be found within the State; and Virginia has adopted the English process of elegit, and a moiety only of the debtor's freehold is delivered to the creditor, until, out of the rents and profits thereof the debt is paid. Do these statute regulations impair the obligation of contracts? I presume this will not be contended for; and yet they would seem to me to fall within the principle urged on the part of the defendant in error.

[* 310] * It is no satisfactory answer to say that such laws relate to the remedy. The principle asserted is, that the creditor has a right to his debtor's property, by virtue of the obligation of the contract, to the full satisfaction of the debt; and if so, a law which in any shape exempts any portion of it, must impair the obligation of the contract. Such a limitation and restriction upon the powers of the state governments cannot, in my judgment, be supported.

under the prohibition to pass laws impairing the obligation of contracts.

If the letter of the constitution does not imperiously demand a construction which denies to the States the power of passing insolvent laws like the one in question, policy and expediency require a contrary construction. Although there may be some diversity of opinion as to the policy of establishing a general bankrupt system in the United States, yet it is generally admitted that such laws are useful, if not absolutely necessary, in a commercial community. That it was the opinion of the framers of the constitution, that the power to pass bankrupt laws ought somewhere to exist, is clearly inferable from the grant of such power to congress. A contrary conclusion would involve the greatest absurdity. The specific power, however, granted to congress, never did nor never could exist in the state governments. That power is to establish uniform laws on the subject of bankruptcies throughout the United States, which could only be done by a government having coextensive jurisdiction. Congress not having as yet deemed it expedient to exercise the power of reëstablishing a uniform system of bankruptcy, affords no well-founded argument against the expediency or necessity of such a system in any particular State. A bankrupt law is most necessary in a commercial community; and as different States in this respect do not stand on the same footing, a system which might be adapted to one, might not suit all, which would naturally present difficulties in forming any uniform system; and congress may, as heretofore, deem it expedient to leave each State to establish such system as shall best suit its own local circumstances and views of policy, knowing, at the same time, that if any great public inconvenience shall grow out of the different state laws, the evils *may be corrected by [*311] establishing a uniform system, according to the provision of the constitution, which will suspend the state laws on the subject. If such should be the views entertained by congress, and induce them to abstain from the exercise of the power, the importance to the State of New York, as well as other States, of establishing the validity of laws like the one in question, is greatly increased. The long continuance of it there, clearly manifests the views of the state legislature with respect to the policy and expediency of the law. And I cannot but feel strongly impressed that the length of time which this law has been in undisputed operation, and the repeated sanction it has received from every department of the government, ought to have great weight when judging of its constitutionality.

The provisions of the 61st section of the bankrupt law of 1800,[1]

[1] 2 Stats. at Large, 36.

appear to me to contain a clear expression of the opinion of congress in favor of the validity of this and similar laws in other States. It cannot be presumed they were ignorant of the existence of these laws, or their extent and operation. And, indeed, the section expressly assumes the existence of such laws, by declaring that this act shall not repeal or annul the laws of any State now in force or which may be thereafter enacted for the relief of insolvent debtors, except so far as the same may affect persons within the purview of the bankrupt act; and even with respect to such persons it provides that, if the creditors shall not prosecute a commission of bankruptcy within a limited time, they shall be entitled to relief under the state laws for the relief of insolvent debtors. And what relief did such laws give? Was it merely from imprisonment only? Certainly not. The state laws here ratified and sanctioned, or, at least, some of them, were such as had the full effect and operation of a bankrupt law, to wit: to discharge the debtor absolutely from all future responsibility. It is true, if these laws were unconstitutional and void, this section of the bankrupt law could give them no validity. But it is not in this light the argument is used. The reference is only to show the sense of congress with respect to the validity of such laws; and, if it is fair to presume congress was acquainted with the extent and operation of these laws, this clause is a direct affirmation of
[* 312] their *validity. For it cannot be presumed that body would have expressly ratified and sanctioned laws which they considered unconstitutional.

In the case of Sturges *v.* Crowninshield, 4 W. 122, as I have before remarked, it is said, that by this prohibition (Art. 1, sec. 10,) in the constitution, the convention appears to have intended to establish a great principle, "that contracts should be inviolable." This was certainly, though a great, yet not a new principle. It is a principle inherent in every sound and just system of laws, independent of express constitutional restraints. And if the assertion of this principle was the object of the clause, as I think it was, is it reasonable to conclude that the framers of the constitution supposed that a bankrupt or insolvent law, like the one in question, would violate this principle? Can it be supposed that the constitution would have reserved the right and impliedly enjoined the duty upon congress to pass a bankrupt law, if it had been thought that such law would violate this great principle? If the discharge of a party from the performance of his contracts, when he has by misfortunes become incapable of fulfilling them, is a violation of the eternal and unalterable principles of justice, growing out of what has been called at the bar the universal law, can it be that a power drawing after it

such consequences has been recognized and reserved in our constitution? Certainly not. And is the discharge of a contract any greater violation of those sacred principles in a state legislature, than in that of the United States? No such distinction will be pretended. But a bankrupt or insolvent law involves no such violation of the great principles of justice, and this is not the light in which it always has been and ought to be considered. Such law, in its principle and object, has in view the benefit of both debtor and creditor, and is no more than the just exercise of the sovereign legislative power of the government to relieve a debtor from his contracts, when necessity and unforeseen misfortunes have rendered him incapable of performing them; and whether this power is to be exercised by the States individually, or by the United States, can make no difference in principle, in a government like ours, where sovereignty, to a modified extent, *exists both in the States and [* 313] in the United States. It was, in the formation of the constitution, a mere question of policy and expediency, where this power should be exercised; and there can be no question but that, so far as respects a bankrupt law, properly speaking, the power ought to be exercised by the general government. It is naturally connected with commerce, and should be uniform throughout the United States. A bankrupt system deals with commercial men, but this affords no reason why a State should not exercise its sovereign power in relieving the necessities of men who do not fall within the class of traders, and who, from like misfortune, have become incapable of performing their contracts.

Without questioning the constitutional power of congress to extend a bankrupt law to all classes of debtors, the expediency of such a measure may well be doubted. There is not the same necessity of uniformity of system, as to other classes than traders; their dealings are generally local, and different considerations of policy may influence different States on this subject; and should congress pass a bankrupt law confined to traders, it would still leave the insolvent law of New York in force as to other classes of debtors, subject to such alteration as that State shall deem expedient.

Upon the whole, therefore, it having been settled by this court that the States have a right to pass bankrupt laws, provided they do not violate the prohibition against impairing the obligation of contracts; and believing, as I do, for the reasons I have given, that the insolvent law in question, by which a debtor obtains a discharge from all future responsibility upon contracts entered into after the passage of the law, and before his discharge, does not impair the obligation of his

contracts, I am of opinion that the judgment of the court below ought to be reversed.

Trimble, J. The question raised upon the record in this case, and which has been discussed at the bar, may be stated thus: Has a State, since the adoption of the constitution of the United
[*314] States, authority to pass a *bankrupt or insolvent law, discharging the bankrupt or insolvent from all contracts made within the State after the passage of the law, upon the bankrupt or insolvent surrendering his effects and obtaining a certificate of discharge from the constituted authorities of the State?

The counsel for the defendant in error have endeavored to maintain the negative of the proposition, on two grounds:—

1. That the power conferred on congress by the constitution, "to establish uniform laws on the subject of bankruptcies throughout the United States," is, in its nature, an exclusive power; that, consequently, no State has authority to pass a bankrupt law; and that the law under consideration is a bankrupt law.

2. That it is a law impairing the obligation of contracts, within the meaning of the constitution.

In the case of Sturges *v.* Crowninshield, 4 W. 122, this court expressly decided, "that since the adoption of the constitution of the United States, a State has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the constitution, and provided there be no act of congress in force to establish a uniform system of bankruptcy conflicting with such law."

This being a direct judgment of the court, overruling the first position assumed in argument, that judgment ought to prevail, unless it be very clearly shown to be erroneous.

Not having been a member of the court when that judgment was given, I will content myself with saying the argument has not convinced me it is erroneous; and that, on the contrary, I think the opinion is fully sustained by a sound construction of the constitution.

There being no act of congress in force to establish a uniform system of bankruptcy, the first ground of argument must fail.

It is argued that the law under consideration is a law impairing the obligation of contracts within the meaning of the constitution. The 10th section of the 1st article of the constitution is in these words: "No State shall enter into any treaty, alliance, or confederation, grant letters of marque and reprisal; coin money;
[*315] emit bills of credit; make any thing *but gold and silver coin a tender in payment of debts; pass any bill of attain-

der, *ex post facto* law, or law impairing the obligation of contracts: or grant any title of nobility."

In the case of Sturges *v.* Crowninshield, the defendant in the original suit had been discharged in New York, under an insolvent law of that State which purported to apply to past as well as future contracts; and being sued on a contract made within the State, prior to the passage of the law, he pleaded his certificate of discharge in bar of the action. In answer to the third and fourth questions, certified from the circuit court to this court, for its final decision, drawing in question the constitutionality of the law and the sufficiency of the plea in bar founded upon it, this court certified its opinion, "that the act of New York, pleaded in this case, so far as it attempts to discharge the contract on which this suit was instituted, is a law impairing the obligation of contracts, within the meaning of the constitution of the United States; and that the plea of the defendant is not a good and sufficient bar of the plaintiff's action."

In the case of M'Millan *v.* M'Neal, 4 Wheat. 209, the defendant in the court below pleaded a discharge obtained by him in Louisiana, on the 23d of August, 1815, under the insolvent law of that State, passed in 1808, in bar of a suit instituted against him upon a contract made in South Carolina, in the year 1813. This court decided that the plea was no bar to the action, and affirmed the judgment given below for the plaintiff.

These cases do not decide the case at bar. In the first, the discharge was pleaded in bar to a contract made prior to the passage of the law; and in the second, the discharge obtained in one State, under its laws, was pleaded to a contract made in another State. They leave the question open, whether a discharge obtained in a State, under an insolvent law of the State, is a good bar to an action brought on a contract made within the State after the passage of the law.

In presenting this inquiry, it is immaterial whether the law purports to apply to past as well as future contracts, or is wholly prospective in its provisions.

*It is not the terms of the law, but its effect, that is [*316] inhibited by the constitution. A law may be in part constitutional and in part unconstitutional. It may, when applied to a given case, produce an effect which is prohibited by the constitution; but it may not, when applied to a case differently circumstanced, produce such prohibited effect. Whether the law under consideration, in its effects and operation upon the contract sued on in this case, be a law impairing the obligation of this contract, is the only necessary inquiry.

In order to come to a just conclusion, we must ascertain, if we can, the sense in which the terms "obligation of contracts" is used in the constitution. In attempting to do this, I will premise that, in construing an instrument of so much solemnity and importance, effect should be given, if possible, to every word. No expression should be regarded as a useless expletive; nor should it be supposed, without the most urgent necessity, that the illustrious framers of that instrument had, from ignorance or inattention, used different words, which are, in effect, merely tautologous.

I understand it to be admitted in argument, and if not admitted it could not be reasonably contested, that, in the nature of things, there is a difference between a contract and the obligation of the contract. The terms contract and obligation, although sometimes used loosely as convertible terms, do not properly impart the same idea. The constitution plainly presupposes that a contract and its obligation are different things. Were they the same thing, and the terms contract and obligation convertible, the constitution, instead of being read as it now is, "that no State shall pass any law impairing the obligation of contracts," might, with the same meaning, be read, "that no State shall pass any law impairing the obligation of obligations," or, "the contract of contracts;" and to give to the constitution the same meaning which either of these readings would import, would be ascribing to its framers a useless and palpably absurd tautology. The illustrious framers of the constitution could not be ignorant that there were or might be many contracts without obligation, and many obligations without contracts. "A contract is defined to be an agreement in which a party
[*317] *undertakes to do or not to do a particular thing." Sturges v. Crowninshield, 4 Wheat. 197.

This definition is sufficient for all the purposes of the present investigation, and its general accuracy is not contested by either side.

From the very terms of the definition, it results incontestably, that the contract is the sole act of the parties, and depends wholly on their will. The same words, used by the same parties, with the same objects in view, would be the same contract, whether made upon a desert island, in London, Constantinople, or New York. It would be the same contract, whether the law of the place where the contract was made recognized its validity and furnished remedies to enforce its performance, or prohibited the contract and withheld all remedy for its violation.

The language of the constitution plainly supposes that the obligation of a contract is something not wholly depending upon the will of the parties. It incontestably supposes the obligation to be

something which attaches to and lays hold of the contract, and which, by some superior external power, regulates and controls the conduct of the parties in relation to the contract; it evidently supposes that superior external power to rest in the will of the legislature.

What, then, is the obligation of contracts, within the meaning of the constitution? From what source does that obligation arise?

The learned Chief Justice, in delivering the opinion of the court, in Sturges *v.* Crowninshield, after having defined a contract to be "an agreement wherein a party undertakes to do or not to do a particular thing," proceeds to define the obligation of the contract in these words: "the law binds him to perform his engagement, and this is, of course, the obligation of the contract."

The Institutes, lib. 3, tit. 14, (Cooper's translation,) says, "an obligation is the chain of the law, by which we are necessarily bound to make some payment, according to the law of the land."

Pothier, in his treatise concerning obligations, in speaking of the obligation of contracts, calls it *vinculum legis*, the chain of the law. Paley, p. 56, says, "to be obliged, is to be [*318] urged by a violent motive, resulting from the command of another." From these authorities, and many more might be cited, it may be fairly concluded that the obligation of the contract consists in the power and efficacy of the law which applies to and enforces performance of the contracts, or the payment of an equivalent for non-performance. The obligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract. This is the sense, I think, in which the constitution uses the term "obligation."

From what law, and how, is this obligation derived, within the meaning of the constitution? Even if it be admitted that the moral law necessarily attaches to the agreement, that would not bring it within the meaning of the constitution. Moral obligations are those arising from the admonitions of conscience and accountability to the Supreme Being. No human lawgiver can impair them. They are entirely foreign from the purposes of the constitution. The constitution evidently contemplates an obligation which might be impaired by a law of the State, if not prohibited by the constitution.

It is argued that the obligation of contracts is founded in and derived from general and universal law; that, by these laws, the obligation of contracts is coextensive with the duty of performance, and, indeed, the same thing; that the obligation is not derived from nor depends upon the civil or municipal laws of the State; and that this general universal duty or obligation is what the constitution

intends to guard and protect against the unjust encroachments of state legislation. In support of this doctrine, it is said that no State, perhaps, ever declared, by statute or positive law, that contracts shall be obligatory; but that all States, assuming the preëxistence of the obligation of contracts, have only superadded, by municipal law, the means of carrying the preëxisting obligation into effect.

This argument struck me, at first, with great force; but, upon reflection, I am convinced it is more specious than solid. If it were admitted that, in an enlarged and very general sense, obligations have their foundation in natural, or, what is called in the [*319] argument, universal law; that this *natural obligation is, in the general, assumed by States as preëxisting, and, upon this assumption, they have not thought it necessary to pass declaratory laws in affirmance of the principles of universal law; yet nothing favorable to the argument can result from these admissions, unless it be further admitted or proved that a State has no authority to regulate, alter, or in anywise control, the operation of this universal law within the State, by its own peculiar municipal enactions. This is not admitted, and, I think, cannot be proved.

I admit that men have, by the laws of nature, the right of acquiring and possessing property, and the right of contracting engagements. I admit that these natural rights have their correspondent natural obligations. I admit that, in a state of nature, when men have not submitted themselves to the controlling authority of civil government, the natural obligation of contracts is coextensive with the duty of performance. This natural obligation is founded solely in the principles of natural or universal law. What is this natural obligation? All writers who treat on the subject of obligations agree that it consists in the right of the one party to demand from the other party what is due; and if it be withheld, in his right and supposed capacity to enforce performance or to take an equivalent for non-performance by his own power. This natural obligation exists among sovereign and independent states and nations, and amongst men in a state of nature, who have no common superior, and over whom none claim or can exercise a controlling legislative authority.

But when men form a social compact and organize a civil government, they necessarily surrender the regulation and control of these natural rights and obligations into the hands of the government. Admitting it, then, to be true, that, in general, men derive the right of private property and of contracting engagements from the principles of natural, universal law; admitting that these rights are, in the general, not derived from or created by society, but are brought

into it; and that no express, declaratory, municipal law, be necessary for their creation or recognition; yet it is equally true that these rights, and the obligations *resulting from them, [*320] are subject to be regulated, modified, and sometimes absolutely restrained, by the positive enactions of municipal law. I think it incontestably true that the natural obligation of private contracts between individuals in society, ceases and is converted into a civil obligation, by the very act of surrendering the right and power of enforcing performance into the hands of the government. The right and power of enforcing performance exists, as I think all must admit, only in the law of the land; and the obligation resulting from this condition is a civil obligation.

As, in a state of nature, the natural obligation of a contract consists in the right and potential capacity of the individual to take, or enforce the delivery of the thing due to him by the contract, or its equivalent; so, in the social state, the obligation of a contract consists in the efficacy of the civil law, which attaches to the contract, and enforces its performance, or gives an equivalent in lieu of performance. From these principles it seems to result as a necessary corollary, that the obligation of a contract made within a sovereign State, must be precisely that allowed by the law of the State, and none other. I say allowed; because, if there be nothing in the municipal law to the contrary, the civil obligation being, by the very nature of government, substituted for and put in the place of natural obligation, would be coextensive with it; but if by positive enactions the civil obligation is regulated and modified so as that it does not correspond with the natural obligation, it is plain the extent of the obligation must depend wholly upon the municipal law. If the positive law of the State declares the contract shall have no obligation, it can have no obligation, whatever may be the principles of natural law in relation to such a contract. This doctrine has been held and maintained by all states and nations. The power of controlling, modifying, and even of taking away all obligation from such contracts as, independent of positive enactions to the contrary, would have been obligatory, has been exercised by all independent sovereigns; and it has been universally held that the courts of one sovereign will, upon principles of comity and common justice, enforce contracts made within the dominions of another sovereign, so far as they were obligatory by *the [*321] law of the country where made; but no instance is recollected, and none is believed to exist, where the courts of one sovereign have held a contract made within the dominions of another, obligatory against or beyond the obligation assigned to it by the

municipal law of its proper country. As a general proposition of law, it cannot be maintained that the obligation of contracts depends upon and is derived from universal law, independent of and against the civil law of the State in which they are made. In relation to the States of this Union, I am persuaded that the position that the obligation of contracts is derived from universal law, urged by the learned counsel in argument with great force, has been stated by them much too broadly. If true, the States can have no control over contracts. If it be true that the "obligation of contracts," within the meaning of the constitution, is derived solely from general and universal law, independent of the laws of the State, then it must follow that all contracts made in the same or similar terms, must, whenever or wherever made, have the same obligation. If this universal natural obligation is that intended by the constitution, as it is the same, not only everywhere but at all times, it must follow that every description of contract which could be enforced, at any time or place, upon the principles of universal law, must necessarily be enforced at all other times and in every State, upon the same principles, in despite of any positive law of the State to the contrary.

The arguments based on the notion of the obligation of universal law, if adopted, would deprive the States of all power of legislation upon the subject of contracts, other than merely furnishing the remedies or means of carrying this obligation of universal law into effect. I cannot believe that such consequences were intended to be produced by the constitution.

I conclude that, so far as relates to private contracts between individual and individual, it is the civil obligation of contracts; that obligation which is recognized by and results from the law of the State in which the contract is made, which is within the [*322] meaning of the constitution. If *so, it follows that the States have, since the adoption of the constitution, the authority to prescribe and declare, by their laws, prospectively, what shall be the obligation of all contracts made within them. Such a power seems to be almost indispensable to the very existence of the States, and is necessary to the safety and welfare of the people. The whole frame and theory of the constitution seems to favor this construction. The States were in full enjoyment and exercise of all the powers of legislation on the subject of contracts, before the adoption of the constitution. The people of the States, in that instrument, transfer to and vest in the congress, no portion of this power, except in the single instance of the authority given to pass uniform laws on the subject of bankruptcies throughout the United States; to which

may be added, such as results by necessary implication in carrying the granted power into effect. The whole of this power is left with the States, as the constitution found it, with the single exception that, in the exercise of their general authority, they shall pass no law "impairing the obligation of contracts."

The construction insisted upon by those who maintain that prospective laws of the sort now under consideration are unconstitutional, would, as I think, transform a special limitation upon the general powers of the States, into a general restriction. It would convert, by construction, the exception into a general rule, against the best settled rules of construction. The people of the States, under every variety of change of circumstances, must remain unalterably, according to this construction, under the dominion of this supposed universal law, and the obligations resulting from it. Upon no acknowledged principle can a special exception, out of a general authority, be extended by construction so as to annihilate or embarrass the exercise of the general authority. But, to obviate the force of this view of the subject, the learned counsel admit that the legislature of a State has authority to provide by law what contracts shall not be obligatory, and to declare that no remedy shall exist for the enforcement of such as the legislative wisdom deems injurious. They say the obligation of a contract is coeval with its existence; that the moment an agreement is made, * obligation attaches to it; [*323] and they endeavor to maintain a distinction between such laws as declare that certain contracts shall not be obligatory at all, and such as declare they shall not be obligatory, or (what is the same thing in effect) shall be discharged, upon the happening of a future event. The former, they say, were no contracts in contemplation of law, were wholly forbidden, and, therefore, never obligatory; the latter were obligatory at their creation, and that obligation is protected by the constitution from being impaired by any future operation of the law.

This course of reasoning is ingenious and perplexing; but I am greatly mistaken if it will not be found, upon examination, to be unsatisfactory and inconclusive. If it were admitted that, generally, the civil obligation of a contract made in a State attaches to it when it is made, and that this obligation, whatever it be, cannot be defeated by any effect or operation of law which does not attach to it at its creation, the admission would avail nothing. It is as well a maxim of political law as of reason, that the whole must necessarily contain all the parts; and, consequently, a power competent to declare a contract shall have no obligation, must necessarily be competent to declare it shall have only a conditional or qualified obligation.

If, as the argument admits, a contract never had any obligation, because the preëxisting law of the State declaring it should have none attached to it at the moment of its creation, why will not a preëxisting law declaring it shall have only a qualified obligation attach to it in like manner at the moment of its creation? A law declaring that a contract shall not be enforced upon the happening of a future event, is a law declaring the contract shall have only a qualified or conditional obligation. If such law be passed before the contract is made, does not the same attach to it the moment it is made; and is not the obligation of the contract, whatever may be its terms, qualified from the beginning by force and operation of the existing law? If it is not, then it is absolute in despite of the law, and the obligation does not result from the law of the land, but from some other law.

The passing of a law declaring that a contract shall have no obligation, or shall have obligation generally, but cease to be
[*324] *obligatory in specified events, is but the exertion of the same power. The difference exists, not in the character of the power, but the degree of its exertion and the manner of its operation.

In the case at bar, the contract was made in the State, and the law of the State at the time it was made, in effect, provided that the obligation of the contract should not be absolute, but qualified by the condition that the party should be discharged upon his becoming insolvent, and complying with the requisitions of the insolvent law. This qualification attached to the contract, by law, the moment the contract was made, became inseparable from it, and travelled with it through all its stages of existence, until the condition was consummated by the final certificate of discharge.

It is argued that this cannot be so, because the contract would be enforced, and must necessarily be enforced, in other States, where no such insolvent law exists. This argument is founded upon a misapprehension of the nature of the qualification itself. It is in nature of a condition subsequent, annexed by operation of law to the contract at the moment of its creation.

The condition is that upon the happening of all the events contemplated by the law, and upon their verification, in the manner prescribed by the law itself, by the constituted authorities of the State, the contract shall not thereafter be obligatory. Unless all these take place, unless the discharge is actually obtained within the State, according to its laws, the contingency has not happened, and the contract remains obligatory, both in the State and elsewhere.

It has been often said that the laws of a State in which a con-

tract is made, enter into and make part of the contract; and some who have advocated the constitutionality of prospective laws, of the character now under consideration, have placed the question on that ground. The advocates of the other side, availing themselves of the infirmity of this argument, have answered triumphantly, "admitting this to be so, the constitution is the supreme law of every State, and must, therefore, upon the same principle, enter into every contract, and overrule the local laws." My answer to this view of both sides of the question is, that the argument and the [*325] answer to it are equally destitute of truth.

I have already shown that the contract is nothing but the agreement of the parties; and that if the parties, in making their agreement, use the same words, with the same object in view, where there is no law, or where the law recognizes the agreement and furnishes remedies for its enforcement, or where the law forbids or withholds all remedy for the enforcement of the agreement, it is the very same contract in all these predicaments. I have endeavored to show, and I think successfully, that the obligation of contracts, in the sense of the constitution, consists not in the contract itself, but in a superior external force controlling the conduct of the parties in relation to the contract; and that this superior external force is the law of the State, either tacitly or expressly recognizing the contract, and furnishing means whereby it may be enforced. It is this superior external force, existing potentially, or actually applied, "which binds a man to perform his engagements," which, according to Justinian, is "the chain of the law, by which we are necessarily bound to make some payment, according to the law of the land;" and which, according to Paley, being "a violent motive, resulting from the command of another," obliges the party to perform his contract. The law of the State, although it constitutes the obligation of the contract, is no part of the contract itself; nor is the constitution either a part of the contract, or the supreme law of the State, in the sense in which the argument supposes. The constitution is the supreme law of the land upon all subjects upon which it speaks. It is the sovereign will of the whole people. Whatever this sovereign will enjoins or forbids, must necessarily be supreme, and must counteract the subordinate legislative will of the United States, and of the States.

But on subjects in relation to which the sovereign will is not declared, or fairly and necessarily implied, the constitution cannot, with any semblance of truth, be said to be the supreme law. It could not, with any semblance of truth, be said that the constitution of the United States is the supreme law of any State in relation to the solemnities requisite for conveying real estate, or the respon-

[* 326] sibilities or obligations * consequent upon the use of certain words in such conveyance. The constitution contains no law, no declaration of the sovereign will, upon these subjects, and cannot, in the nature of things, in relation to them, be the supreme law. Even if it were true, then, that the law of a State in which a contract is made is part of the contract, it would not be true that the constitution would be part of the contract. The constitution nowhere professes to give the law of contracts, or to declare what shall or shall not be the obligation of contracts. It evidently presupposes the existence of contracts by the act of the parties, and the existence of their obligation, not by authority of the constitution, but by authority of law; and the preëxistence of both the contracts and their obligation being thus supposed, the sovereign will is announced that "no State shall pass any law impairing the obligation of contracts."

If it be once ascertained that a contract existed, and that an obligation, general or qualified, of whatsoever kind, had once attached or belonged to the contract by law, then, and not till then, does the supreme law speak, by declaring that obligation shall not be impaired.

It is admitted in argument, that statutes of frauds and perjuries, statutes of usury and of limitation, are not laws impairing the obligation of contracts. They are laws operating prospectively upon contracts thereafter made. It is said, however, they do not apply, in principle, to this case, because the statutes of frauds and perjuries apply only to the remedies; and because, in that case, and under the statutes of usury, the contracts were void from the beginning, were not recognized by law as contracts, and had no obligation; and that the statutes of limitation create rules of evidence only.

Although these observations are true, they do not furnish the true reason, nor, indeed, any reason, why these laws do not impair the obligation of contracts. The true and only reason is, that they operate on contracts made after the passage of the laws, and not upon existing contracts. And hence the Chief Justice very properly remarks, of both usury laws and laws of limitation, in delivering the opinion in Sturges *v.* Crowninshield, that if they should be [* 327] made to * operate upon contracts already entered into, they would be unconstitutional and void. If a statute of frauds and perjuries should pass in a State formerly having no such laws, purporting to operate upon existing contracts, as well as upon those made after its passage, could it be doubted that, so far as the law applied to and operated upon existing contracts, it would be a law "impairing the obligation of contracts?" Here, then, we have the true reason and principle of the constitution. The great principle

intended to be established by the constitution, was the inviolability of the obligation of contracts, as the obligation existed and was recognized by the laws in force at the time the contracts were made. It furnished to the legislatures of the States a simple and obvious rule of justice, which, however theretofore violated, should by no means be thereafter violated; and whilst it leaves them at full liberty to legislate upon the subject of all future contracts, and assign to them either no obligation or such qualified obligation as, in their opinion, may consist with sound policy and the good of the people, it prohibits them from retrospecting upon existing obligations, upon any pretext whatever. Whether the law professes to apply to the contract itself, to fix a rule of evidence, a rule of interpretation, or to regulate the remedy, it is equally within the true meaning of the constitution, if it, in effect, impairs the obligation of existing contracts; and, in my opinion, is out of its true meaning if the law is made to operate on future contracts only. I do not mean to say that every alteration of the existing remedies would impair the obligation of contracts; but I do say, with great confidence, that a law taking away all remedy from existing contracts would be, manifestly, a law impairing the obligation of contracts. The moral obligation would remain, but the legal or civil obligation would be gone, if such a law should be permitted to operate. The natural obligation would be gone, because the laws forbid the party to enforce performance by his own power. On the other hand, a great variety of instances may readily be imagined, in which the legislature of a State might alter, modify, or repeal existing remedies, and enact others in their stead, without the slightest ground for a supposition *that [*328] the new law impaired the obligation of contracts. If there be intermediate cases of a more doubtful character, it will be time enough to decide them when they arise.

It is argued that, as the clause declaring that "no State shall pass any law impairing the obligation of contracts," is associated in the same section of the constitution with the prohibition to "coin money, emit bills of credit," or "make any thing but gold and silver coin a legal tender in payment of debts;" and as these all evidently apply to legislation in reference to future as well as existing contracts, and operate prospectively, to prohibit the action of the law, without regard to the time of its passage, the same construction should be given to the clause under consideration.

This argument admits of several answers. First, as regards the prohibition to coin money and emit bills of credit. The constitution had already conferred on congress the whole power of coining money and regulating the current coin. The grant of this power to con-

gress, and the prohibitions upon the States, evidently take away from the States all power of legislation and action on the subject, and must, of course, apply to the future action of laws, either then made or to be made. Indeed, the language plainly indicates that it is the act of "coining money," and the act of emitting bills of credit, which is forbidden, without any reference to the time of passing the law, whether before or after the adoption of the constitution. The other prohibition, to "make any thing but gold or silver coin a tender in payment of debts," is but a member of the same subject of currency committed to the general government and prohibited to the States. And the same remark applies to it already made as to the other two. The prohibition is, not that no State shall pass any law, but that, even if a law does exist, the "State shall not make any thing but gold and silver coin a legal tender." The language plainly imports that the prohibited tender shall not be made a legal tender, whether a law of the State exists or not. The whole subject of tender, except in gold and silver, is withdrawn from the States. These cases cannot, therefore, furnish a sound rule of interpretation for that clause which prohibits the States from passing laws "impairing [* 329] the obligation of contracts." This * clause relates to a subject confessedly left wholly with the States, with a single exception; they relate to subjects wholly withdrawn from the States, with the exception that they may pass laws on the subject of tender in gold and silver coin only.

The principle that the association of one clause with another of like kind may aid in its construction is deemed sound, but I think it has been misapplied in the argument. The principle applied to the immediate associates of the words under consideration, is, I think, decisive of this question. The immediate associates are the prohibitions to pass bills of attainder and *ex post facto* laws. The language and order of the whole clause is, no State shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." If the maxim *noscitur a sociis* be applied to this case, there would seem to be an end of the question. The two former members of the clause undeniably prohibit retroactive legislation upon the existing state of things, at the passage of the prohibited laws. The associated idea is that the latter member of the same clause should have a similar effect upon the subject-matter to which it relates. I suppose this was the understanding of the American people when they adopted the constitution. I am justified in this supposition by the contemporary construction given to the whole of this clause by that justly celebrated work styled the Federalist, written at the time, for the purpose of recommending the constitution to

the favor and acceptance of the people. In No. 44, p. 281, commenting upon this very clause and all its members, the following observations are made: "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters."

Did the American people believe, could they believe, these heavy denunciations were levelled against laws which fairly prescribed *and plainly pointed out to the people rules for [*330] their future conduct, and the rights, duties, and obligations growing out of their future words or actions? They must have understood that these denunciations were just, as regarded bills of attainder and *ex post facto* laws, because they were exercises of arbitrary power, perverting the justice and order of existing things by the reflex action of these laws. And would they not naturally and necessarily conclude the denunciations were equally just as regarded laws passed to impair the obligation of existing contracts, for the same reason?

The writer proceeds: "Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."

I cannot understand this language otherwise than as putting bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, all upon the same footing, and deprecating them all for the same cause. The language shows clearly that the whole clause

was understood, at the time of the adoption of the constitution, to have been introduced into the instrument in the very same spirit and for the very same purpose, namely, for the protection of per-
[*331] sonal *security and of private rights. The language repels the idea that the member of the clause immediately under consideration was introduced into the constitution upon any grand principle of national policy, independent of the protection of private rights, so far as such an idea can be repelled by the total omission to suggest any such independent grand principle of national policy, and by placing it upon totally different ground.

It proves that the sages who formed and recommended the constitution to the favor and adoption of the American people, did not consider the protection of private rights, more than the protection of personal security, as too insignificant for their serious regard, as was urged with great earnestness in argument. In my judgment, the language of the authors of the Federalist proves that they, at least, understood that the protection of personal security and of private rights, from the despotic and iniquitous operation of retrospective legislation, was, itself, and alone, the grand principle intended to be established. It was a principle of the utmost importance to a free people, about to establish a national government, "to establish justice," and "to secure to themselves and their posterity the blessings of liberty." This principle is, I think, fully and completely sustained by the construction of the constitution which I have endeavored to maintain.

In my judgment, the most natural and obvious import of the words themselves, prohibiting the passing of laws "impairing the obligation of contracts;" the natural association of that member of the clause with the two immediately preceding members of the same clause, forbidding the passing of "bills of attainder and *ex post facto* laws;" the consecutive order of the several members of the clause; the manifest purposes and objects for which the whole clause was introduced into the constitution, and the contemporary exposition of the whole clause, all warrant the conclusion that a State has authority, since the adoption of the constitution, to pass a law whereby a contract made within the State, after the passage of the law, may be discharged, upon the party obtaining a certificate of discharge, as an insolvent, in the manner prescribed by the law of the State.

[*332] *MARSHALL, C. J. It is well known that the court has been divided in opinion on this case. Three judges, Mr. Justice DUVALL, Mr. Justice STORY, and myself, do not concur in

the judgment which has been pronounced. We have taken a different view of the very interesting question which has been discussed with so much talent, as well as labor, at the bar, and I am directed to state the course of reasoning on which we have formed the opinion that the discharge pleaded by the defendant is no bar to the action.

The single question for consideration, is, whether the act of the State of New York is consistent with or repugnant to the constitution of the United States.

This court has so often expressed the sentiments of profound and respectful reverence with which it approaches questions of this character, as to make it unnecessary now to say more than that, if it be right that the power of preserving the constitution from legislative infraction should reside any where, it cannot be wrong, it must be right, that those on whom the delicate and important duty is conferred should perform it according to their best judgment.

Much, too, has been said concerning the principles of construction which ought to be applied to the constitution of the United States.

On this subject, also, the court has taken such frequent occasion to declare its opinion, as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers; is to repeat what has been already said more at large, and is all that can be necessary.

As preliminary to a more particular investigation of the clause in the constitution, on which the case now under consideration is supposed to depend, it may be proper to inquire *how [*333] far it is affected by the former decisions of this court.

In Sturges v. Crowninshield, 4 W. 122, it was determined that an act which discharged the debtor from a contract entered into previous to its passage, was repugnant to the constitution. The reasoning which conducted the court to that conclusion might, perhaps, conduct it further; and with that reasoning, (for myself alone this expression is used,) I have never yet seen cause to be dissatisfied. But that decision is not supposed to be a precedent for Ogden v. Saunders, because the two cases differ from each other in a material fact; and it is a general rule, expressly recognized by the court in Sturges v. Crowninshield, that the positive authority of a decision is coex-

tensive only with the facts on which it is made. In Sturges *v.* Crowninshield, the law acted on a contract which was made before its passage; in this case, the contract was entered into after the passage of the law.

In M'Neal *v.* M'Millan, 4 W. 209, the contract, though subsequent to the passage of the act, was made in a different State, by persons residing in that State, and, consequently, without any view to the law, the benefit of which was claimed by the debtor.

The Farmers' and Mechanics' Bank of Pennsylvania *v.* Smith, 6 W. 131, differed from Sturges *v.* Crowninshield only in this, that the plaintiff and defendant were both residents of the State in which the law was enacted, and in which it was applied. The court was of opinion that this difference was unimportant.

It has then been decided that an act which discharges the debtor from preëxisting contracts is void; and that an act which operates on future contracts is inapplicable to a contract made in a different State, at whatever time it may have been entered into.

Neither of these decisions comprehends the question now presented to the court. It is, consequently, open for discussion.

The provision of the constitution is that "no State shall pass any law" "impairing the obligation of contracts." The plaintiff in error contends that this provision inhibits the passage of [*334] retrospective laws only — of such as act on contracts * in existence at their passage. The defendant in error maintains that it comprehends all future laws, whether prospective or retrospective, and withdraws every contract from state legislation, the obligation of which has become complete.

That there is an essential difference in principle between laws which act on past and those which act on future contracts; that those of the first description can seldom be justified, while those of the last are proper subjects of ordinary legislative discretion, must be admitted. A constitutional restriction, therefore, on the power to pass laws of the one class, may very well consist with entire legislative freedom respecting those of the other. Yet, when we consider the nature of our Union, that it is intended to make us, in a great measure, one people, as to commercial objects; that, so far as respects the intercommunication of individuals, the lines of separation between States are, in many respects, obliterated; it would not be matter of surprise if, on the delicate subject of contracts once formed, the interference of state legislation should be greatly abridged or entirely forbidden. In the nature of the provision, then, there seems to be nothing which ought to influence our construction of the words; and, in making that construction, the whole clause, which

consists of a single sentence, is to be taken together, and the intention is to be collected from the whole.

The first paragraph of the tenth section of the first article, which comprehends the provision under consideration, contains an enumeration of those cases in which the action of the state legislature is entirely prohibited. The second enumerates those in which the prohibition is modified. The first paragraph, consisting of total prohibitions, comprehends two classes of powers. Those of the first are political and general in their nature, being an exercise of sovereignty without affecting the rights of individuals. These are, the powers "to enter into any treaty, alliance, or confederation; grant letters of marque or reprisal, coin money, emit bills of credit."

The second class of prohibited laws comprehends those whose operation consists in their action on individuals. [*335] These are laws which make any thing but gold and silver coin a tender in payment of debts, bills of attainder, *ex post facto* laws, or laws impairing the obligation of contracts, or which grant any title of nobility.

In all these cases, whether the thing prohibited be the exercise of mere political power, or legislative action on individuals, the prohibition is complete and total. There is no exception from it. Legislation of every description is comprehended within it. A State is as entirely forbidden to pass laws impairing the obligation of contracts, as to make treaties, or coin money. The question recurs, what is a law impairing the obligation of contracts?

In solving this question, all the acumen which controversy can give to the human mind, has been employed in scanning the whole sentence, and every word of it. Arguments have been drawn from the context, and from the particular terms in which the prohibition is expressed, for the purpose, on the one part, of showing its application to all laws which act upon contracts, whether prospectively or retrospectively; and, on the other, of limiting it to laws which act on contracts previously formed.

The first impression which the words make on the mind, would probably be that the prohibition was intended to be general. A contract is commonly understood to be the agreement of the parties; and, if it be not illegal, to bind them to the extent of their stipulations. It requires reflection, it requires some intellectual effort, to efface this impression, and to come to the conclusion that the words contract and obligation, as used in the constitution, are not used in this sense. If, however, the result of this mental effort, fairly made, be the correction of this impression, it ought to be corrected.

So much of this prohibition as restrains the power of the States to

punish offenders in criminal cases, the prohibition to pass bills of attainder and *ex post facto* laws, is, in its very terms, confined to pre-existing cases. A bill of attainder can be only for crimes already committed; and a law is not *ex post facto*, unless it looks back to an act done before its passage. Language is incapable of expressing, in plainer terms, that the mind of the convention was
[*336] directed to retroactive *legislation. The thing forbidden is retroaction. But that part of the clause which relates to the civil transactions of individuals is expressed in more general terms; in terms which comprehend, in their ordinary signification, cases which occur after, as well as those which occur before, the passage of the act. It forbids a State to make any thing but gold and silver coin a tender in payment of debts, or to pass any law impairing the obligation of contracts. These prohibitions relate to kindred subjects. They contemplate legislative interference with private rights, and restrain that interference. In construing that part of the clause which respects tender laws, a distinction has never been attempted between debts existing at the time the law may be passed, and debts afterwards created. The prohibition has been considered as total; and yet the difference in principle between making property a tender in payment of debts, contracted after the passage of the act, and discharging those debts without payment, or by the surrender of property, between an absolute right to tender in payment, and a contingent right to tender in payment, or in discharge of the debt, is not clearly discernible. Nor is the difference in language so obvious, as to denote plainly a difference of intention in the framers of the instrument. "No State shall make any thing but gold and silver coin a tender in payment of debts." Does the word "debts" mean, generally, those due when the law applies to the case, or is it limited to debts due at the passage of the act? The same train of reasoning which would confine the subsequent words to contracts existing at the passage of the law, would go far in confining these words to debts existing at that time. Yet, this distinction has never, we believe, occurred to any person. How soon it may occur is not for us to determine. We think it would unquestionably defeat the object of the clause.

The counsel for the plaintiff insist that the word "impairing," in the present tense, limits the signification of the provision to the operation of the act at the time of its passage; that no law can be accurately said to impair the obligation of contracts, un-
[*337] less the contracts exist at the time. *The law cannot impair what does not exist. It cannot act on nonentities.

There might be weight in this argument, if the prohibited laws

were such only as operated of themselves, and immediately on the contract. But insolvent laws are to operate on a future, contingent, unforeseen event. The time to which the word "impairing" applies, is not the time of the passage of the act, but of its action on the contract. That is, the time present in contemplation of the prohibition. The law, at its passage, has no effect whatever on the contract. Thus, if a note be given in New York, for the payment of money, and the debtor removes out of that State into Connecticut, and becomes insolvent, it is not pretended that his debt can be discharged by the law of New York. Consequently, that law did not operate on the contract at its formation. When, then, does its operation commence? We answer, when it is applied to the contract. Then, if ever, and not till then, it acts on the contract, and becomes a law impairing its obligation. Were its constitutionality, with respect to previous contracts, to be admitted, it would not impair their obligation until an insolvency should take place, and a certificate of discharge be granted. Till these events occur, its impairing faculty is suspended. A law, then, of this description, if it derogates from the obligation of a contract, when applied to it, is, grammatically speaking, as much a law impairing that obligation, though made previous to its formation, as if made subsequently.

A question of more difficulty has been pressed with great earnestness. It is, what is the original obligation of a contract made after the passage of such an act as the insolvent law of New York? Is it unconditional to perform the very thing stipulated, or is the condition implied that, in the event of insolvency, the contract shall be satisfied by the surrender of property? The original obligation, whatever that may be, must be preserved by the constitution. Any law which lessens must impair it.

All admit that the constitution refers to and preserves the legal, not the moral obligation of a contract. * Obligations [* 338] purely moral are to be enforced by the operation of internal and invisible agents, not by the agency of human laws. The restraints imposed on States by the constitution are intended for those objects which would, if not restrained, be the subject of state legislation. What, then, was the original legal obligation of the contract now under the consideration of the court?

The plaintiff insists that the law enters into the contract so completely as to become a constituent part of it. That it is to be construed as if it contained an express stipulation to be discharged, should the debtor become insolvent, by the surrender of all his property for the benefit of his creditors, in pursuance of the act of the legislature.

This is, unquestionably, pressing the argument very far; and the establishment of the principle leads inevitably to consequences which would affect society deeply and seriously.

Had an express condition been inserted in the contract, declaring that the debtor might be discharged from it at any time, by surrendering all his property to his creditors, this condition would have bound the creditor. It would have constituted the obligation of his contract; and a legislative act, annulling the condition, would impair the contract. Such an act would, as is admitted by all, be unconstitutional, because it operates on preëxisting agreements. If a law authorizing debtors to discharge themselves from their debts by surrendering their property, enters into the contract and forms a part of it, if it is equivalent to a stipulation between the parties, no repeal of the law can affect contracts made during its existence. The effort to give it that effect would impair their obligation. The counsel for the plaintiff perceive and avow this consequence, in effect, when they contend that, to deny the operation of the law on the contract under consideration, is to impair its obligation. Are gentlemen prepared to say that an insolvent law, once enacted, must, to a considerable extent, be permanent? That the legislature is incapable of varying it, so far as respects existing contracts?

So, too, if one of the conditions of an obligation for the payment of money be, that, on the insolvency of the obligor, [* 339] * or on any event agreed on by the parties, he should be at liberty to discharge it by the tender of all or part of his property, no question could exist respecting the validity of the contract, or respecting its security from legislative interference. If it should be determined that a law authorizing the same tender, on the same contingency, enters into and forms a part of the contract, then a tender law, though expressly forbidden, with an obvious view to its prospective as well as retrospective operation, would, by becoming the contract of the parties, subject all contracts made after its passage to its control. If it be said that such a law would be obviously unconstitutional and void, and, therefore, could not be a constituent part of the contract, we answer that, if the insolvent law be unconstitutional, it is equally void, and equally incapable of becoming, by mere implication, a part of the contract. The plainness of the repugnancy does not change the question. That may be very clear to one intellect, which is far from being so to another. The law now under consideration is, in the opinion of one party, clearly consistent with the constitution, and, in the opinion of the other, as clearly repugnant to it. We do not admit the correctness of that reasoning which would settle this question, by introducing into the contract a stipulation not admitted by the parties.

This idea admits of being pressed still further. If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act, then, declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, would become a component part of every contract, and be one of its conditions. Thus, one of the most important features in the constitution of the United States, one which the state of the times most urgently required, one on which the good and the wise reposed confidently for securing the prosperity and harmony of our citizens, would lie prostrate, and be construed into an inanimate, inoperative, unmeaning clause.

Gentlemen are struck with the enormity of this result, and deny that their principle leads to it. They distinguish, or attempt to distinguish, between the incorporation of a * general law, such as has been stated, and the incorporation of a particular law, such as the insolvent law of New York, into the contract. But will reason sustain this distinction? They say that men cannot be supposed to agree to so indefinite an article as such a general law would be, but may well be supposed to agree to an article, reasonable in itself, and the full extent of which is understood. [* 340]

But the principle contended for does not make the insertion of this new term or condition into the contract to depend upon its reasonableness. It is inserted because the legislature has so enacted. If the enactment of the legislature becomes a condition of the contract because it is an enactment, then it is a high prerogative, indeed, to decide that one enactment shall enter the contract, while another, proceeding from the same authority, shall be excluded from it.

The counsel for the plaintiff illustrates and supports this position by several legal principles, and by some decisions of this court, which have been relied on as being applicable to it.

The first case put is interest on a bond, payable on demand, which does not stipulate interest. This, he says, is not a part of the remedy, but a new term in the contract.

Let the correctness of this averment be tried by the course of proceeding in such cases.

The failure to pay, according to stipulation, is a breach of the contract, and the means used to enforce it constitute the remedy which society affords the injured party. If the obligation contains a penalty, this remedy is universally so regulated that the judgment shall be entered for the penalty, to be discharged by the payment of the principal and interest. But the case on which counsel has reasoned

is a single bill. In this case, the party who has broken his contract is liable for damages. The proceeding to obtain those damages is as much a part of the remedy as the proceeding to obtain the debt. They are claimed in the same declaration, and as being distinct from each other. The damages must be assessed by a jury; whereas, if interest formed a part of the debt, it would be recovered as part of it. The declaration would claim it as a part of the debt; and yet, if a suitor were to declare on such a bond as containing this new term * for the payment of interest, he would not be permitted to give a bond in evidence, in which this supposed term was not written. Any law regulating the proceedings of courts on this subject, would be a law regulating the remedy.

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The liability of the drawer of a bill of exchange, stands upon the same principle with every other implied contract. He has received the money of the person in whose favor the bill is drawn, and promises that it shall be returned by the drawee. If the drawee fail to pay the bill, then the promise of the drawer is broken, and for this breach of contract he is liable. The same principle applies to the indorser. His contract is not written, but his name is evidence of his promise that the bill shall be paid, and of his having received value for it. He is, in effect, a new drawer, and has made a new contract. The law does not require that this contract shall be in writing; and, in determining what evidence shall be sufficient to prove it, does not introduce new conditions not actually made by the parties. The same reasoning applies to the principle which requires notice. The original contract is not written at large. It is founded on the acts of the parties, and its extent is measured by those acts. A draws on B in favor of C, for value received. The bill is evidence that he has received value, and has promised that it shall be paid. He has funds in the hands of the drawer, and has a right to expect that his promise will be performed. He has, also, a right to expect notice of its non-performance, because his conduct may be materially influenced by this failure of the drawee. He ought to have notice that his bill is disgraced, because this notice enables him to take measures for his own security. It is reasonable that he should stipulate for this notice, and the law presumes that he did stipulate for it.

A great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations, which, as honest, fair, and just men, they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract, or introduce

new terms into it, but declares that certain acts, unexplained by compact, impose *certain duties, and that the parties [*342] had stipulated for their performance. The difference is obvious between this and the introduction of a new condition into a contract drawn out in writing, in which the parties have expressed every thing that is to be done by either.

The usage of banks, by which days of grace are allowed on notes payable and negotiable in bank, is of the same character. Days of grace, from their very term, originate partly in convenience, and partly in the indulgence of the creditor. By the terms of the note, the debtor has to the last hour of the day on which it becomes payable, to comply with it; and it would often be inconvenient to take any steps after the close of day. It is often convenient to postpone subsequent proceedings till the next day. Usage has extended this time of grace generally to three days, and in some banks to four. This usage is made a part of the contract, not by the interference of the legislature, but by the act of the parties. The case cited from 9 W. 581, Renner *v.* Bank of Columbia, is a note discounted in bank. In all such cases the bank receives and the maker of the note pays interest for the days of grace. This would be illegal and usurious, if the money was not lent for these additional days. The extent of the loan, therefore, is regulated by the act of the parties, and this part of the contract is founded on their act. Since, by contract, the maker is not liable for his note until the days of grace are expired, he has not broken his contract until they expire. The duty of giving notice to the indorser of his failure, does not arise until the failure has taken place; and, consequently, the promise of the bank to give such notice is performed, if it be given when the event has happened.

The case of the Bank of Columbia *v.* Okley, 4 W. 235, was one in which the legislature had given a summary remedy to the bank for a broken contract, and had placed that remedy in the hands of the bank itself. The case did not turn on the question whether the law of Maryland was introduced into the contract, but whether a party might not, by his own conduct, renounce his claim to the trial by jury in a particular case. The court likened it to submissions to arbitration, and to stipulation and forthcoming bonds. The principle settled *in that case is, that a party may renounce [*343] a benefit, and that Okley had exercised this right.

The cases from Strange and East turn upon a principle which is generally recognized, but which is entirely distinct from that which they are cited to support. It is, that a man who is discharged by the tribunals of his own country, acting under its laws, may plead that discharge in any other country. The principle is, that laws act upon

a contract, not that they enter into it and become a stipulation of the parties. Society affords a remedy for breaches of contract. If that remedy has been applied, the claim to it is extinguished. The external action of law upon contracts, by administering the remedy for their breach, or otherwise, is the usual exercise of legislative power. The interference with those contracts, by introducing conditions into them not agreed to by the parties, would be a very unusual and a very extraordinary exercise of the legislative power, which ought not to be gratuitously attributed to laws that do not profess to claim it. If the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other State as in New York, and would still retain the stipulation originally introduced into it, that the debtor should be discharged by the surrender of his estate.

It is not, we think, true that contracts are entered into in contemplation of the insolvency of the obligor. They are framed with the expectation that they will be literally performed. Insolvency is undoubtedly a casualty which is possible, but is never expected. In the ordinary course of human transactions, if even suspected, provision is made for it by taking security against it. When it comes unlooked for, it would be entirely contrary to reason to consider it as a part of the contract.

We have, then, no hesitation in saying that, however law may act upon contracts, it does not enter into them, and become a part of the agreement. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of States, by arresting their power to repeal or modify such laws with respect to existing contracts.

[* 344] * But, although the argument is not sustainable in this form, it assumes another in which it is more plausible. Contract, it is said, being the creature of society, derives its obligation from the law; and, although the law may not enter into the agreement so as to form a constituent part of it, still, it acts externally upon the contract, and determines how far the principle of coercion shall be applied to it; and this being universally understood, no individual can complain justly of its application to himself, in a case where it was known when the contract was formed.

This argument has been illustrated by references to the statutes of frauds, of usury, and of limitations. The construction of the words in the constitution, respecting contracts, for which the defendants contend, would, it has been said, withdraw all these subjects from state legislation. The acknowledgment that they remain within it, is urged as an admission that contract is not withdrawn by the con-

stitution, but remains under state control, subject to this restriction only, that no law shall be passed impairing the obligation of contracts in existence at its passage.

The defendants maintain that an error lies at the very foundation of this argument. It assumes that contract is the mere creature of society, and derives all its obligation from human legislation. That it is not the stipulation an individual makes which binds him, but some declaration of the supreme power of a State to which he belongs, that he shall perform what he has undertaken to perform. That, though this original declaration may be lost in remote antiquity, it must be presumed as the origin of the obligation of contracts. This postulate the defendants deny, and, we think, with great reason.

It is an argument of no inconsiderable weight against it, that we find no trace of such an enactment. So far back as human research carries us, we find the judicial power as a part of the executive, administering justice by the application of remedies to violated rights or broken contracts. We find that power applying these remedies on the idea of a preëxisting obligation on every man to do what he has promised on consideration to do; that the breach of this obligation is an injury for which the injured party has a just claim *to compensation, and that society ought to afford [*345] him a remedy for that injury. We find allusions to the mode of acquiring property, but we find no allusion, from the earliest time, to any supposed act of the governing power giving obligation to contracts. On the contrary, the proceedings respecting them of which we know any thing, evince the idea of a preëxisting intrinsic obligation which human law enforces. If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to exist anterior to and independent of society, we may reasonably conclude that those original and preëxisting principles are, like many other natural rights, brought with man into society; and, although they may be controlled, are not given by human legislation.

In the rudest state of nature a man governs himself, and labors for his own purposes. That which he acquires is his own, at least while in his possession, and he may transfer it to another. This transfer passes his right to that other. Hence the right to barter. One man may have acquired more skins than are necessary for his protection from the cold; another more food than is necessary for his immediate use. They agree each to supply the wants of the other from his surplus. Is this contract without obligation? If one of them, having received and eaten the food he needed, refuses to deliver the skin, may not the other rightfully compel him to deliver it? Or two per-

sons agree to unite their strength and skill to hunt together for their mutual advantage, engaging to divide the animal they shall master. Can one of them rightfully take the whole? or, should he attempt it, may not the other force him to a division? If the answer to these questions must affirm the duty of keeping faith between these parties, and the right to enforce it if violated, the answer admits the obligation of contracts, because, upon that obligation depends the right to enforce them. Superior strength may give the power, but cannot give the right. The rightfulness of coercion must depend on the preëxisting obligation to do that for which compulsion is used.

[* 346] It is no objection to the principle, that the injured party may be the weakest. In society, the *wrongdoer may be too powerful for the law. He may deride its coercive power, yet his contracts are obligatory; and, if society acquire the power of coercion, that power will be applied without previously enacting that his contract is obligatory.

Independent nations are individuals in a state of nature. Whence is derived the obligation of their contracts? They admit the existence of no superior legislative power which is to give them validity, yet their validity is acknowledged by all. If one of these contracts be broken, all admit the right of the injured party to demand reparation for the injury, and to enforce that reparation if it be withheld. He may not have the power to enforce it, but the whole civilized world concurs in saying that the power, if possessed, is rightfully used.

In a state of nature, these individuals may contract, their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement.

What is the effect of society upon these rights? When men unite together and form a government, do they surrender their right to contract, as well as their right to enforce the observance of contracts? For what purpose should they make this surrender? Government cannot exercise this power for individuals. It is better that they should exercise it for themselves. For what purpose, then, should the surrender be made? It can only be, that government may give it back again. As we have no evidence of the surrender, or of the restoration of the right; as this operation of surrender and restoration would be an idle and useless ceremony, the rational inference seems to be that neither has ever been made; that individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment,

and to pledge himself for a future act. These rights are not given by society, but are brought into it. The right of coercion is *necessarily surrendered to government, and this surrender [*347] imposes on government the correlative duty of furnishing a remedy. The right to regulate contracts, to prescribe rules by which they shall be evidenced, to prohibit such as may be deemed mischievous, is unquestionable, and has been universally exercised. So far as this power has restrained the original right of individuals to bind themselves by contract, it is restrained; but beyond these actual restraints the original power remains unimpaired.

This reasoning is, undoubtedly, much strengthened by the authority of those writers on natural and national law, whose opinions have been viewed with profound respect by the wisest men of the present and of past ages.

Supposing the obligation of the contract to be derived from the agreement of the parties, we will inquire how far law acts externally on it, and may control that obligation. That law may have, on future contracts, all the effect which the counsel for the plaintiff in error claim, will not be denied. That it is capable of discharging the debtor, under the circumstances and on the conditions prescribed in the statute which has been pleaded in this case, will not be controverted. But as this is an operation which was not intended by the parties, nor contemplated by them, the particular act can be entitled to this operation only when it has the full force of law. A law may determine the obligation of a contract on the happening of a contingency, because it is the law. If it be not the law, it cannot have this effect. When its existence as law is denied, that existence cannot be proved by showing what are the qualities of a law. Law has been defined by a writer, whose definitions especially have been the theme of almost universal panegyric, "to be a rule of civil conduct prescribed by the supreme power in a state." In our system, the legislature of a State is the supreme power, in all cases where its action is not restrained by the constitution of the United States. Where it is so restrained, the legislature ceases to be the supreme power, and its acts are not law. It is, then, begging the question to say that, because contracts may be discharged by a law previously enacted, this contract may be discharged by this act of the legislature of New York; for the question *returns upon [*348] us, is this act a law? Is it consistent with or repugnant to the constitution of the United States? This question is to be solved only by the constitution itself.

In examining it, we readily admit that the whole subject of contracts is under the control of society, and that all the power of society

over it resides in the state legislatures, except in those special cases where restraint is imposed by the constitution of the United States. The particular restraint now under consideration is on the power to impair the obligation of contracts. The extent of this restraint cannot be ascertained by showing that the legislature may prescribe the circumstances on which the original validity of a contract shall be made to depend. If the legislative will be, that certain agreements shall be in writing, that they shall be sealed, that they shall be attested by a certain number of witnesses, that they shall be recorded, or that they shall assume any prescribed form before they become obligatory, all these are regulations which society may rightfully make, and which do not come within the restrictions of the constitution, because they do not impair the obligation of the contract. The obligation must exist before it can be impaired; and a prohibition to impair it, when made, does not imply an inability to prescribe those circumstances which shall create its obligation. The statutes of frauds, therefore, which have been enacted in the several states, and which are acknowledged to flow from the proper exercise of State sovereignty, prescribe regulations which must precede the obligation of the contract, and, consequently, cannot impair that obligation. Acts of this description, therefore, are most clearly not within the prohibition of the constitution.

The acts against usury are of the same character. They declare the contract to be void in the beginning. They deny that the instrument ever became a contract. They deny it all original obligation; and cannot impair that which never came into existence.

Acts of limitations approach more nearly to the subject of consideration, but are not identified with it. They defeat a contract once obligatory, and may, therefore, be supposed to partake [* 349] of the character of laws which impair its * obligation. But a practical view of the subject will show us that the two laws stand upon distinct principles.

In the case of Sturges *v.* Crowninshield, it was observed by the court that these statutes relate only to the remedies which are furnished in the courts; and their language is generally confined to the remedy. They do not purport to dispense with the performance of a contract, but proceed on the presumption that a certain length of time, unexplained by circumstances, is reasonable evidence of a performance. It is on this idea alone that it is possible to sustain the decision, that a bare acknowledgment of the debt, unaccompanied with any new promise, shall remove the bar created by the act. It would be a mischief not to be tolerated, if contracts might be set up at any distance of time, when the evidence of payment might be lost,

and the estates of the dead, or even of the living, be subjected to these stale obligations. The principle is, without the aid of a statute, adopted by the courts as a rule of justice. The legislature has enacted no statute of limitations as a bar to suits on sealed instruments. Yet twenty years of unexplained silence on the part of the creditor is evidence of payment. On parol contracts, or on written contracts not under seal, which are considered in a less solemn point of view than sealed instruments, the legislature has supposed that a shorter time might amount to evidence of performance, and has so enacted. All have acquiesced in these enactments, but have never considered them as being of that class of laws which impair the obligation of contracts. In prescribing the evidence which shall be received in its courts, and the effect of that evidence, the State is exercising its acknowledged powers. It is likewise in the exercise of its legitimate powers, when it is regulating the remedy and mode of proceedings in its courts.

The counsel for the plaintiff in error insist that the right to regulate the remedy and to modify the obligation of the contract are the same; that obligation and remedy are identical, that they are synonymous —two words conveying the same idea.

The answer given to this proposition by the defendant's counsel seems to be conclusive. They originate at different times. The obligation to perform is coeval with the * undertaking [*350] to perform; it originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon a broken contract, and enforces a preëxisting obligation.

If there be any thing in the observations made in a preceding part of this opinion respecting the source from which contracts derive their obligation, the proposition we are now considering cannot be true. It was shown, we think, satisfactorily, that the right to contract is the attribute of a free agent, and that he may rightfully coerce performance from another free agent who violates his faith. Contracts have, consequently, an intrinsic obligation. When men come into society, they can no longer exercise this original and natural right of coercion. It would be incompatible with general peace, and is, therefore, surrendered. Society prohibits the use of private individual coercion, and gives in its place a more safe and more certain remedy. But the right to contract is not surrendered with the right to coerce performance. It is still incident to that degree of free agency which the laws leave to every individual, and the obligation of the contract is a necessary consequence of the right to make it. Laws regulate this right, but, where not regulated, it is retained in its original extent. Obligation and remedy, then, are not identical:

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they originate at different times, and are derived from different sources.

But, although the identity of obligation and remedy be disproved, it may be, and has been urged, that they are precisely commensurate with each other, and are such sympathetic essences, if the expression may be allowed, that the action of law upon the remedy is immediately felt by the obligation — that they live, languish, and die together. The use made of this argument is to show the absurdity and self-contradiction of the construction which maintains the inviolability of obligation, while it leaves the remedy to the state governments.

We do not perceive this absurdity or self-contradiction.

Our country exhibits the extraordinary spectacle of distinct, and, in many respects, independent governments over the same territory and the same people. The local governments are restrained [*351] from impairing the obligation of *contracts, but they furnish the remedy to enforce them, and administer that remedy in tribunals constituted by themselves. It has been shown that the obligation is distinct from the remedy, and, it would seem to follow, that law might act on the remedy without acting on the obligation. To afford a remedy is certainly the high duty of those who govern to those who are governed. A failure in the performance of this duty subjects the government to the just reproach of the world. But the constitution has not undertaken to enforce its performance. That instrument treats the States with the respect which is due to intelligent beings, understanding their duties, and willing to perform them; not as insane beings, who must be compelled to act for self-preservation. Its language is the language of restraint, not of coercion. It prohibits the States from passing any law impairing the obligation of contracts; it does not enjoin them to enforce contracts. Should a State be sufficiently insane to shut up or abolish its courts, and thereby withhold all remedy, would this annihilation of remedy annihilate the obligation also of contracts? We know it would not. If the debtor should come within the jurisdiction of any court of another State, the remedy would be immediately applied, and the inherent obligation of the contract enforced. This cannot be ascribed to a renewal of the obligation; for passing the line of a State cannot recreate an obligation which was extinguished. It must be the original obligation derived from the agreement of the parties, and which exists unimpaired though the remedy was withdrawn.

But, we are told that the power of the State over the remedy may be used to the destruction of all beneficial results from the right; and hence it is inferred that the construction which maintains the

inviolability of the obligation, must be extended to the power of regulating the remedy.

The difficulty which this view of the subject presents, does not proceed from the identity or connection of right and remedy, but from the existence of distinct governments acting on kindred subjects. The constitution contemplates restraint as to the obligation of contracts, not as to the application of remedy. If this restraint affects a power which the constitution did not mean to touch, it can *only be when that power is used as an instru- [*352] ment of hostility to invade the inviolability of contract, which is placed beyond its reach. A State may use many of its acknowledged powers in such manner as to come in conflict with the provisions of the constitution. Thus the power over its domestic police, the power to regulate commerce purely internal, may be so exercised as to interfere with the regulations of commerce with foreign nations, or between the States. In such cases, the power which is supreme must control that which is not supreme, when they come in conflict. But this principle does not involve any self-contradiction, or deny the existence of the several powers in the respective governments. So, if a State shall not merely modify, or withhold a particular remedy, but shall apply it in such manner as to extinguish the obligation without performance, it would be an abuse of power which could scarcely be misunderstood, but which would not prove that remedy could not be regulated without regulating obligation.

The counsel for the plaintiff in error put a case of more difficulty, and urge it as a conclusive argument against the existence of a distinct line dividing obligation from remedy. It is this. The law affords remedy by giving execution against the person, or the property, or both. The same power which can withdraw the remedy against the person, can withdraw that against the property, or that against both, and thus effectually defeat the obligation. The constitution, we are told, deals not with form, but with substance; and cannot be presumed, if it designed to protect the obligation of contracts from State legislation, to have left it thus obviously exposed to destruction.

The answer is, that if the law goes further, and annuls the obligation without affording the remedy which satisfies it, if its action on the remedy be such as palpably to impair the obligation of the contract, the very case arises which we suppose to be within the constitution. If it leaves the obligation untouched, but withholds the remedy, or affords one which is merely nominal, it is like all other cases of misgovernment, and leaves the debtor still liable to his creditor, should he be found, or should his property be found, where

the laws afford a remedy. If that high sense of duty which
[*353] *men selected from the government of their fellow-citizens must be supposed to feel, furnishes no security against a course of legislation which must end in self-destruction; if the solemn oath taken by every member, to support the constitution of the United States, furnishes no security against intentional attempts to violate its spirit while evading its letter; the question how far the constitution interposes a shield for the protection of an injured individual, who demands from a court of justice that remedy which every government ought to afford, will depend on the law itself which shall be brought under consideration. The anticipation of such a case would be unnecessarily disrespectful, and an opinion on it would be, at least, premature. But, however the question might be decided, should it be even determined that such a law would be a successful evasion of the constitution, it does not follow, that an act which operates directly on the contract after it is made, is not within the restriction imposed on the States by that instrument. The validity of a law acting directly on the obligation, is not proved by showing that the constitution has provided no means for compelling the States to enforce it.

We perceive, then, no reason for the opinion that the prohibition "to pass any law impairing the obligation of contracts," is incompatible with the fair exercise of that discretion, which the State legislatures possess in common with all governments, to regulate the remedies afforded by their own courts. We think that obligation and remedy are distinguishable from each other. That the first is created by the act of the parties, the last is afforded by government. The words of the restriction we have been considering, countenance, we think, this idea. No State shall "pass any law impairing the obligation of contracts." These words seems to us to import that the obligation is intrinsic, that it is created by the contract itself, not that it is dependent on the laws made to enforce it. When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of
[*354] *nature and nations have guided public opinion on the subjects of obligation and contract. If we turn to those treatises, we find them to concur in the declaration that contracts possess an original intrinsic obligation, derived from the acts of free agents, and not given by government. We must suppose that the framers of our constitution took the same view of the subject, and the language they have used confirms this opinion.

The propositions we have endeavored to maintain, of the truth of which we are ourselves convinced, are these: —

That the words of the clause in the constitution, which we are considering, taken in their natural and obvious sense, admit of a prospective as well as of a retrospective operation.

That an act of the legislature does not enter into the contract, and become one of the conditions stipulated by the parties; nor does it act externally on the agreement, unless it have the full force of law.

That contracts derive their obligation from the act of the parties, not from the grant of government; and that the right of government to regulate the manner in which they shall be formed, or to prohibit such as may be against the policy of the State, is entirely consistent with their inviolability after they have been formed.

That the obligation of a contract is not identified with the means which government may furnish to enforce it; and that a prohibition to pass any law impairing it, does not imply a prohibition to vary the remedy, nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties.

We cannot look back to the history of the times when the august spectacle was exhibited of the assemblage of a whole people by their representatives in convention, in order to unite thirteen independent sovereignties under one government, so far as might be necessary for the purposes of union, without being sensible of the great importance which was at that time attached to the 10th section of the 1st article. The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and *controls the conduct of every individual in those things [*355] which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise as well as the virtuous of this great community, and was one of the important benefits expected from a reform of the government.

To impose restraints on state legislation, as respected this delicate and interesting subject, was thought necessary by all those patriots who could take an enlightened and comprehensive view of our

situation; and the principle obtained an early admission into the various schemes of government which were submitted to the convention. In framing an instrument, which was intended to be perpetual, the presumption is strong that every important principle introduced into it is intended to be perpetual also; that a principle expressed in terms to operate in all future time, is intended so to operate. But if the construction, for which the plaintiff's counsel contend, be the true one, the constitution will have imposed a restriction in language, indicating perpetuity, which every State in the Union may elude at pleasure. The obligation of contracts in force, at any given time, is but of short duration; and, if the inhibition be of retrospective laws only, a very short lapse of time will remove every subject on which the act is forbidden to operate, and make this provision of the constitution so far useless. Instead of introducing a great principle, prohibiting all laws of this obnoxious character, the constitution will only suspend their operation for a moment, or except from it preëxisting cases. The object would scarcely seem to be of sufficient importance to have found a place in that instrument.

This construction would change the character of the provision, and convert an inhibition to pass laws impairing the obli-
[*356] gation of contracts into an inhibition to pass *retrospective laws. Had this been the intention of the convention, is it not reasonable to believe that it would have been so expressed? Had the intention been to confine the restriction to laws which were retrospective in their operation, language could have been found, and would have been used, to convey this idea. The very word would have occurred to the framers of the instrument, and we should have probably found it in the clause. Instead of the general prohibition to pass any "law impairing the obligation of contracts," the prohibition would have been to the passage of any retrospective law. Or, if the intention had been not to embrace all retrospective laws, but those only which related to contracts, still, the word would have been introduced, and the state legislatures would have been forbidden "to pass any retrospective law impairing the obligation of contracts," or "to pass any law impairing the obligation of contracts previously made." Words which directly and plainly express the cardinal intent, always present themselves to those who are preparing an important instrument, and will always be used by them. Undoubtedly there is an imperfection in human language, which often exposes the same sentence to different constructions. But it is rare, indeed, for a person of clear and distinct perceptions, intending to convey one principal idea, so to express himself as to leave any

doubt respecting that idea. It may be uncertain whether his words comprehend other things not immediately in his mind; but it can seldom be uncertain whether he intends the particular thing to which his mind is specially directed. If the mind of the convention, in framing this prohibition, had been directed, not generally to the operation of laws upon the obligation of contracts, but particularly to their retrospective operation, it is scarcely conceivable that some word would not have been used indicating this idea. In instruments prepared on great consideration, general terms, comprehending a whole subject, are seldom employed to designate a particular, we might say, a minute portion of that subject. The general language of the clause is such as might be suggested by a general intent to prohibit state legislation on the subject to which that language is applied, the obligation of *contracts; not such as [*357] would be suggested by a particular intent to prohibit retrospective legislation.

It is also worthy of consideration, that those laws which had effected all that mischief the constitution intended to prevent, were prospective as well as retrospective, in their operation. They embraced future contracts, as well as those previously formed. There is the less reason for imputing to the convention an intention, not manifested by their language, to confine a restriction intended to guard against the recurrence of those mischiefs, to retrospective legislation. For these reasons, we are of opinion that, on this point, the district court of Louisiana has decided rightly.

Judgment having been entered in favor of the validity of a certificate of discharge under the state laws in those cases, argued in connection with Ogden *v.* Saunders, where the contract was made between citizens of the State under whose law the discharge was obtained, and in whose courts the certificate was pleaded, the cause was further argued by the same counsel, upon the points reserved, as to the effect of such a discharge in respect to a contract made with a citizen of another State, and where the certificate was pleaded in the courts of another State, or of the United States.

*Johnson, J. I am instructed by the majority of the [*358] court finally to dispose of this cause. The present majority is not the same which determined the general question on the constitutionality of state insolvent laws, with reference to the violation of the obligation of contracts. I now stand united with the minority on the former question, and, therefore, feel it due to myself and the community to maintain my consistency.

The question now to be considered is, whether a discharge of a debtor under a state insolvent law, would be valid against a creditor or citizen of another State, who has never voluntarily subjected himself to the state laws, otherwise than by the origin of his contract.

As between its own citizens, whatever be the origin of the contract, there is now no question to be made on the effect of such a discharge; nor is it to be questioned, that a discharge not valid under the constitution in the courts of the United States, is equally invalid in the state courts. The question to be considered goes to the invalidity of the discharge altogether, and, therefore, steers clear of that provision in the constitution which purports to give validity in every State to the records, judicial proceedings, and so forth, of each State.

The question now to be considered, was anticipated in [* 359] * the case of Sturges *v.* Crowninshield, 4 W. 122, when the court, in the close of the opinion delivered, declared that it means to confine its views to the case then under consideration, and not to commit itself as to those in which the interests and rights of a citizen of another State are implicated.

The question is one partly international, partly constitutional. My opinion on the subject is briefly this: that the provision in the constitution which gives the power to the general government to establish tribunals of its own in every State, in order that the citizens of other States or sovereignties might therein prosecute their rights under the jurisdiction of the United States, had for its object an harmonious distribution of justice throughout the Union; to confine the States, in the exercise of their judicial sovereignty, to cases between their own citizens; to prevent, in fact, the exercise of that very power over the rights of citizens of other States, which the origin of the contract might be supposed to give to each State; and thus, to obviate that *conflictus legum*, which has employed the pens of Huberus and various others, and which any one who studies the subject will plainly perceive it is infinitely more easy to prevent than to adjust.

These conflicts of power and right necessarily arise only after contracts are entered into. Contracts, then, become the appropriate subjects of judicial cognizance; and if the just claims which they give rise to, are violated by arbitrary laws, or if the course of distributive justice be turned aside, or obstructed by legislative interference, it becomes a subject of jealousy, irritation, and national complaint or retaliation.

It is not unimportant to observe, that the constitution was adopted at the very period when the courts of Great Britain were engaged in adjusting the conflicts of right which arose upon their own bankrupt law, among the subjects of that crown in the several dominions of

Scotland, Ireland, and the West Indies. The first case we have on the effect of foreign discharges, that of Ballantine *v.* Golding, 1 Cooke's Bank. Law, 487, occurred in 1783, and the law could hardly be held settled before the case of Hunter *v.* Potts, 4 Term Rep. 182, which was decided in 1791.

* Any one who will take the trouble to investigate the [* 360] subject, will, I think, be satisfied, that although the British courts profess to decide upon a principle of universal law, when adjudicating upon the effect of a foreign discharge, neither the passage in Vattel, to which they constantly refer, nor the practice and doctrines of other nations, will sustain them in the principle to the extent in which they assert it. It was all-important to a great commercial nation, the creditors of all the rest of the world, to maintain the doctrine as one of universal obligation, that the assignment of the bankrupt's effects, under a law of the country of the contract, should carry the interest in his debts, wherever his debtor may reside; and that no foreign discharge of his debtor should operate against debts contracted with the bankrupt in his own country. But I think it perfectly clear that, in the United States, a different doctrine has been established; and, since the power to discharge the bankrupt is asserted on the same principle with the power to assign his debts, that the departure from it in the one instance, carries with it a negation of the principle altogether.

It is vain to deny that it is now the established doctrine in England, that the discharge of a bankrupt shall be effectual against contracts of the State that give the discharge, whatsoever be the allegiance or country of the creditor. But I think it equally clear, that this is a rule peculiar to her jurisprudence, and that reciprocity is the general rule of other countries; that the effect given to such discharge is so much a matter of comity, that the States of the European continent, in all cases, reserve the right of deciding whether reciprocity will not operate injuriously upon their own citizens.

Huberus, in his third axiom on this subject, puts the effect of such laws upon the ground of courtesy, and recognizes the reservation that I have mentioned; other writers do the same.

I will now examine the American decisions on this subject; and, first, in direct hostility with the received doctrines of the British courts, it has been solemnly adjudged in this court, and, I believe, in every state court of the Union, that, notwithstanding the laws of bankruptcy in * England, a creditor of the bankrupt [* 361] may levy an attachment on a debt due the bankrupt in this country, and appropriate the proceeds to his own debt.

In the case of Harrison *v.* Sterry, 5 C. 298, 302, a case decided in

this court, in 1809, upon full argument, and great deliberation, and in which all the English cases were quoted, it is expressly adjudged, "that in the case of a contract made with foreigners in a foreign country, the bankrupt laws of the foreign country are incapable of operating a legal transfer of property in the United States," and judgment was given in favor of the attaching creditors, against the claim of the foreign assignees.

In that case, also, another important doctrine is established in hostility with the British doctrine. For the United States had interposed a claim against the English assignees, in order to obtain satisfaction from the proceeds of the bankrupt's effects in this country, for a debt contracted in Great Britain. And this court decreed, accordingly, expressly restricting the power of the country of the contract to its concoction and exposition.

The language of the court is: "The law of the place where a contract is made, is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege, dependent on the laws of the place where the property lies, and where the court sits which decides the cause."

And, accordingly, the law of the United States was sustained, which gave the debts due the bankrupt here, to satisfy a debt contracted in England, to the prejudice of the law of England, which gave the same debt to the assignees of the bankrupt.

It cannot be necessary to go further than this case to establish that, so far as relates to the foreign creditor, this country does not recognize the English doctrine, that the bankrupt law of the country of the contract is paramount in disposing of the rights of the bankrupt.

[*362] *The United States pass a law which asserts the right to appropriate a debt due a foreign bankrupt, to satisfying a debt due itself, and incurred by that bankrupt in his own country. The assignees of that bankrupt question this right, and claim the debt as legally vested in them by the law of the country of the contract, and maintain that the debt due the United States, being contracted in Great Britain, was subject to the laws of Great Britain, and therefore entitled only to share in common with other creditors in the proceeds of the bankrupt's effects; that the debt so appropriated by the law of the United States to its exclusive benefit was, as to all the bankrupt's contracts, or certainly as to all English contracts, vested in the assignees, on international principles, principles which gave effect to the English bankrupt laws, so vesting that debt, paramount to the laws of other countries.

In giving effect to the law of the United States, this court overrules that doctrine; and, in the act of passing that law, this government asserts both the power over the subject, and the right to exercise that power without a violation of national comity; or has at least taken its stand against that comity, and asserted a right to protect its own interests, which, in principle, is equally applicable to the interests of its own citizens.

It has had, in fact, regard to the *lex loci rei sitæ*, as existing in the person and funds of the debtor of the bankrupt, and the rights of self-preservation, and duty of protection to its own citizens, and the actual allegiance of the creditor and debtor, not the metaphysical allegiance of the contract, on which the foreign power is asserted.

It would be in vain to assign the decision of this court in Harrison *v.* Sterry, 5 C. 289, or the passing of the law of the United States, to the general preference, which the government may assert in the payment of its own debt, since that preference can only exist to the prejudice of its own citizens, whereas, the precedence there claimed and conceded operated to the prejudice of British creditors.

The case of Baker *v.* Wheaton, adjudged in the courts of Massachusetts in the time of Chief Justice Parsons, 5 Mass. 509, is a very strong case upon this subject. That also was argued with great care, and all the British cases *reviewed; the court [*363] took time to deliberate, and the same doctrine was maintained, in the same year and the same month with Harrison *v.* Sterry, and certainly without any communication between the two courts.

The case was this: one Wheaton gave a promissory note to one Chandler, both being at that time citizens and inhabitants of Rhode Island. Wheaton was discharged under the bankrupt laws of Rhode Island, both still continuing citizens and inhabitants of the same State, and the note remaining the property of Chandler. Subsequent to the discharge, Chandler indorses the note to Baker, and Wheaton is arrested in Massachusetts. He pleads the discharge in bar, and the court in deciding, expresses itself thus: "When, therefore, the defendant was discharged from that contract, *lege loci*, the promisee was bound by that discharge, as he was a party to the laws of that State, and assenting to their operation. But if, when the contract was made, the promisee had not been a citizen of Rhode Island, he would not have been bound by the laws of it or any other State, and holding this note at the time of the discharge, he might afterwards maintain an action upon it in the courts of this State." And again (page 311): "If the note had been transferred to the plaintiff, a citizen of this State, whilst it remained due and undis-

charged by the insolvent laws of Rhode Island, those laws could not affect his rights in the courts of law in this State, because he is not bound by them."

This, it will be observed, regards a contract acknowledged to be of Rhode Island origin.

There is another case reported in the decisions of the same State, 10 Mass. 337, which carries this doctrine still further, and, I apprehend, to a length which cannot be maintained.

This was the case of Watson *v.* Bourne, in which Watson, a citizen of Massachusetts, had sued Bourne in a state court, and obtained judgment. Bourne was discharged under the insolvent laws of that State, and being afterwards found in Massachusetts was arrested on an action of debt upon the judgment. He pleads the discharge; plaintiff replies, that he, plaintiff, was a citizen of Massachusetts, and, therefore, not precluded by the dis-
[*364] charge. The origin of the *debt does not appear from the report, and the argument turned wholly on the question, whether, by entering judgment in the court of the State, he had not subjected his rights to the state laws *pro tanto*.

The court overruled the plea, and recognized the doctrine in Baker *v.* Wheaton, 5 Mass. 509, by declaring, "that a discharge of that nature can only operate where the law is made by an authority common to the creditor and debtor in all respects, where both are citizens or subjects."

I have little doubt that the court was wrong in denying the effect of the discharge as against judgments rendered in the state courts, when the party goes voluntarily and unnecessarily into those courts; but the decision shows, in other respects, how decidedly the British doctrine is repelled in the courts of that state.

The British doctrine is also unequivocally repelled in a very learned opinion delivered by Mr. Justice Nott, in the court of the last resort in South Carolina, and in which the whole court, consisting of the common law judges of the State, concurred. This was in the case of the Assignees of Topham *v.* Chapman *et al.*, in which the rights of the attaching creditor were maintained against those of the assignees of the bankrupt; 1 Constitutional Reports, 283; and that the same rule was recognized at an early day in the court of Pennsylvania, appears from the leading case of Phillips *v.* Hunter, 2 H. Black. 402, in which a British creditor, who had recovered of a debtor of the bankrupt in Pennsylvania, was compelled by the British courts to refund to the assignees in England, as for money had and received to their use.

I think it, then, fully established, that in the United States a cred

itor of the foreign bankrupt may attach the debt due the foreign bankrupt, and apply the money to the satisfaction of his peculiar debt, to the prejudice of the rights of the assignees or other creditors.

I do not here speak of assignees, or rights created, under the bankrupt's own deed; those stand on a different ground, and do not affect this question. I confine myself to assignments, or transfers, resting on the operation of the laws of the country, independent of the bankrupt's deed; to the *rights and liabilities of debtor, [*365] creditor, bankrupt, and assignees, as created by law.

What is the actual bearing of this right to attach, so generally recognized by our decisions?

It imports a general abandonment of the British principles; for, according to their laws, the assignee alone has the power to release the debtor. But the right to attach necessarily implies the right to release the debtor, and that right is here asserted under the laws of a State which is not the State of the contract.

So, also, the creditor of the bankrupt is, by the laws of his country, entitled to no more than a ratable participation in the bankrupt's effects. But the right to attach imports a right to exclusive satisfaction, if the effects so attached should prove adequate to make satisfaction.

The right to attach also imports the right to sue the bankrupt; and who would impute to the bankrupt law of another country, the power to restrain the citizens of these States in the exercise of their right to go into the tribunals of their own country for the recovery of debts, wherever they may have originated? Yet, universally, after the law takes the bankrupt into its own hands, his creditors are prohibited from suing.

Thus much for the law of this case in an international view. I will consider it with reference to the provisions of the constitution.

I have said above, that I had no doubt the erection of a distinct tribunal for the resort of citizens of other States, was introduced *ex industria*, into the constitution, to prevent, among other evils, the assertion of a power over the rights of the citizens of other States, upon the metaphysical ideas of the British courts on the subject of jurisdiction over contracts. And there was good reason for it; for, upon that principle it is, that a power is asserted over the rights of creditors which involves a mere mockery of justice.

Thus, in the case of Burrows v. Jamineau, (reported in 2 Strange, and better reported in Moseley, 1, and some other books,) the creditor, residing in England, was cited, probably, by a placard on a door-post in Leghorn, to appear there to *answer to [*366]

his debtor; and his debt passed upon by the court, perhaps, without his having ever heard of the institution of legal process to destroy it.

The Scotch, if I remember correctly, attach the summons on the flag-staff, or in the market-place, at the shore of Leith; and the civil law process by proclamation, or *viis et modis*, is not much better, as the means of subjecting the rights of foreign creditors to their tribunals.

All this mockery of justice, and the jealousies, recriminations, and perhaps retaliations which might grow out of it are avoided, if the power of the States over contracts, after they become the subject exclusively of judicial cognizance, is limited to the controversies of their own citizens.

And it does appear to me almost incontrovertible, that the States cannot proceed one step further without exercising a power incompatible with the acknowledged powers of other States, or of the United States, and with the rights of the citizens of other States.

Every bankrupt or insolvent system in the world, must partake of the character of a judicial investigation. Parties whose rights are to be affected, are entitled to a hearing. Hence every system, in common with the particular system now before us, professes to summon the creditors before some tribunal, to show cause against granting a discharge to the bankrupt.

But on what principle can a citizen of another State be forced into the courts of a State for this investigation? The judgment to be passed is to prostrate his rights; and on the subject of these rights the constitution exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract may originate. In the only tribunal to which he owes allegiance, the state insolvent or bankrupt laws cannot be carried into effect; they have a law of their own on the subject;[1] and a certificate of discharge under any other law would not be acknowledged as valid even in the courts of the state in which the court of the United States, that grants it, is held. Where is the reciprocity? Where the reason upon
[*367] which the state courts *can thus exercise a power over the suitors of that court, when that court possesses no such power over the suitors of the state courts?

In fact, the constitution takes away the only ground upon which this eminent dominion over particular contracts can be claimed, which is that of sovereignty. For the constitutional suitors in the courts of the United States, are not only exempted from the necessity of resorting to the state tribunals, but actually cannot be forced into them. If, then, the law of the English courts had ever been practically adopted in this country in the state tribunals, the constitution has produced

[1] 2 Stats. at Large, 4.

such a radical modification of state power over even their own contracts, in the hands of individuals not subject to their jurisdiction, as to furnish ground for excepting the rights of such individuals from the power which the States unquestionably possess over their own contracts, and their own citizens.

Follow out the contrary doctrine in its consequences, and see the absurdity it will produce.

The constitution has constituted courts professedly independent of state power in their judicial course; and yet the judgments of those courts are to be vacated, and their prisoners set at large, under the power of the state courts, or of the state laws, without the possibility of protecting themselves from its exercise.

I cannot acquiesce in an incompatibility so obvious.

No one has ever imagined that a prisoner in confinement, under process from the courts of the United States, could avail himself of the insolvent laws of the State in which the court sits. And the reason is, that those laws are municipal and peculiar, and appertaining exclusively to the exercise of state power in that sphere in which it is sovereign, that is, between its own citizens, between suitors subjected to state power exclusively, in their controversies between themselves.

In the courts of the United States, no higher power is asserted than that of discharging the individual in confinement under its own process. This affects not to interfere with the rights of creditors in the state courts, against the same individual. Perfect reciprocity would seem to * indicate, that no greater power [*368] should be exercised under state authority over the rights of suitors who belong to the United States jurisdiction. Even although the principle asserted in the British courts, of supreme and exclusive power over their own contracts, had obtained in the courts of the United States, I must think that power has undergone a radical modification by the judicial powers granted to the United States.

I, therefore, consider the discharge, under a state law, as incompetent to discharge a debt due a citizen of another State; and it follows that the plea of a discharge here set up, is insufficient to bar the rights of the plaintiff.

It becomes necessary, therefore, to consider the other errors assigned in behalf of the defendant; and, first, as to the plea of the act of limitations.

The statute pleaded here is not the act of Louisiana, but that of New York; and the question is not raised by the facts or averments, whether he could avail himself of that law if the full time had run out before his departure from New York, as was supposed in argu-

ment. The plea is obviously founded on the idea that the statute of the State of the contract was generally pleadable in any other State, a doctrine that will not bear argument.

The remaining error assigned has regard to the sum for which the judgment is entered, it being for a greater amount than the nominal amount of the bills of exchange on which the suit was brought, and which are found by the verdict.

There has been a defect of explanation on this subject; but from the best information afforded us, we consider the amount for which judgment is entered, as made up of principal, interest, and damages, and the latter as being legally incident to the finding of the bills of exchange, and their non-payment, and assessed by the court under a local practice consonant with that by which the amount of written contracts is determined, by reference to the prothonotary, in many other of our courts. We, therefore, see no error in it. The judgment below will, therefore, be affirmed.

And the purport of this adjudication, as I understand it, is, that as between citizens of the same State, a discharge of a bank-
[*369] rupt by the laws of that State, is valid as it affects *posterior contracts; that as against creditors, citizens of other States, it is invalid as to all contracts.

The propositions which I have endeavored to maintain in the opinion which I have delivered are these: —

1. That the power given to the United States to pass bankrupt laws is not exclusive.

2. That the fair and ordinary exercise of that power by the States does not necessarily involve a violation of the obligation of contracts, *multi fortiori* of posterior contracts.

3. But when, in the exercise of that power, the States pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the constitution of the United States.

Mr. Justice WASHINGTON, Mr. Justice THOMPSON, and Mr. Justice TRIMBLE, dissented.

Mr. Chief Justice MARSHALL, Mr. Justice DUVALL, and Mr. Justice STORY, assented to the judgment, which was entered for the defendant in error. *Judgment affirmed.*[1]

12 W. 370; 5 P. 1; 6 P. 348, 635; 8 P. 88; 9 P. 329; 12 P. 657, 14 P. 67; 5 H. 295, 554; 6 H. 301; 10 H. 395; 17 H. 322; 19 H. 393.

[1] In the case of Shaw v. Robbins, the judgment below was reversed. This was an

Mason v. Haile.

12 W. 370.

Under a bond to remain a true prisoner until lawfully discharged, a discharge under a resolve of the legislature, passed in conformity with an ancient usage thus to relieve from imprisonment, is a lawful discharge, and does not impair the obligation of the contract.

This was an action of debt, brought in the circuit court of Rhode Island, upon two several bonds given by the defendant, Haile, to the plaintiff, Mason, and one Bates, whom the plaintiff survives, one of which bonds was executed on the 14th, and the other on the 29th of March, 1814.

The case is stated in the opinion of the court.

Webster and *Bliss*, for the plaintiff.

Whipple and *Wheaton*, for the defendant.

* Thompson, J., delivered the opinion of the court. [*374] The question in this case arises upon the following certificate of a division of opinion of the judges of the circuit court of the United States for the district of Rhode Island: "This cause came on to be heard, and was argued by counsel on both sides, and thereupon the following question occurred, namely, whether, upon the amended pleas in this case, severally pleaded to the first and second counts of the *plaintiff's declaration, and to [*375] which there are demurrers, and joinders in demurrer, the defendant is entitled to judgment, on the ground that the matters set forth therein, on the part of the defendant, are sufficient to bar the action; or whether the plaintiff is entitled, upon said demurrers and joinders, to judgment? Upon which question the court was divided in opinion."

action on several bills of exchange, drawn by the plaintiff on the defendant, payable to plaintiff's order, and by the defendant duly accepted. At the time of the transaction the plaintiff was a citizen of Massachusetts, resident in that State, and the defendant a citizen of New York, and there resident. The action was brought in a state court, in Ohio, and the defendant relied on a discharge, obtained in New York, under the provisions of the insolvent laws of that State. The highest court of law in Ohio gave judgment for the defendant; and the cause was brought before this court by a writ of error.

Mr. Justice Johnson. This is a contract between a citizen of New York and a citizen of Massachusetts. It only differs from Ogden v. Saunders in this particular, that the action was brought in a state court; not the court of New York, but the court of another State. We think the decision in the case of Ogden v. Saunders applies to this, and must govern its decision. The judgment below, therefore, must be reversed, and the cause remanded for such further proceedings as the law may require.

It is not understood by this court, that any question as to the sufficiency of the pleas, in point of form, is drawn under examination, but simply whether, upon the merits, the matter thereby set up is sufficient to bar the action. The action is founded upon two several bonds, given by the defendant to the plaintiff, and one Bates, whom the plaintiff survives, one dated the 14th, and the other the 29th of March, 1814. The condition in both bonds is the same, except as to dates and sums, and is as follows: "The condition of the above obligation is such, that if the above bounden Nathan Haile, now a prisoner in the state's jail, in Providence, within the county of Providence, at the suit of said Mason and Bates, do, and shall from henceforth continue to be a true prisoner, in the custody, guard, and safe-keeping of Andrew Waterman, keeper of said prison, and in the custody, guard, and safe-keeping of his deputy, officers, and servants, or some one of them, within the limits of said prison, until he shall be lawfully discharged, without committing any manner of escape or escapes during the time of restraint, then this obligation to be void, or else to remain in full force and virtue."

The defence set up by the pleas, to show there has been no breach of the condition of the bond, is substantially, that in June, 1814, after giving the bond in question, the defendant presented a petition to the legislature of Rhode Island, praying relief, and the benefit of the Insolvent Act of 1756; and that, in the mean time, all proceedings against his person and estate, for the collection of debts, might be stayed, and he be liberated from jail, on giving bonds to return in case his petition should not be granted. Upon this petition, the legislature, in February, 1816, passed the following resolution: "On the petition of Nathan Haile, praying, for the reasons therein stated, that the benefit of an act, entitled, an act for the [*376] relief of insolvent debtors, passed in the year *1756, be extended to him, voted that said petition be continued until the next session of this assembly; and that, in the mean time, all proceedings against the said Haile, on account of his debts, be stayed; and that the said Haile be liberated from his present imprisonment, in the jail, in the county of Providence, on his giving sufficient bond to the sheriff of the county, conditioned to return to jail in case said petition is not granted." The defendant, after the passing of this resolution, gave the bond required by it, and on the 28th of the same month was discharged from imprisonment, and has ever since been at large, out of the custody of the sheriff. In February, 1816, the legislature, upon a due hearing, granted the prayer of the defendant, and passed the following resolution: "On the petition of Nathan Haile, of Foster, praying, for the reasons therein stated, that

the benefit of an act, passed in June, 1756, for the relief of insolvent debtors may be extended to him, voted that the prayer of the said petition be, and the same is hereby granted." By the granting of the prayer of the petition, the condition of the second bond given to the sheriff was complied with, and the bond became extinguished.

The defendant afterwards proceeded to take the benefit of the insolvent act revived in his favor, according to the statute provisions, and received in due form from the proper court, a judgment, "that he should be, and thereby was fully discharged of and from all debts, contracts, and demands, of every name, nature, and kind, outstanding against him, debts due to the State aforesaid, or to the United States excepted, and from all imprisonment, arrest, and restraint of his person therefor." The insolvent act of 1756 is not considered in force as a general and permanent law; but the legislature of Rhode Island has been in the constant habit of entertaining petitions like the present, and has by the general law of 1798, now in force, prescribed the mode by which such petitions are to be regulated; and, in case of granting the prayer of the petition, the course is to pass an act or resolution, giving the benefit of the act of 1756 to the petitioner, and thus, in effect, reviving it for his particular benefit. So that the mode pursued to obtain the discharge of the defendant, as set out in the pleas, was according to the established course * of proceeding in cases of insolvency, and in con- [*377] formity to the laws of Rhode Island, by which the defendant was discharged from all his contracts, and from imprisonment.

The effect of this discharge upon the original judgment against Haile is not now drawn in question. The only inquiry is, whether he has violated the condition of his bonds of March, 1814, by going at large, under the authority and sanction of the resolutions of the legislature as before stated. His bond required him to remain a true prisoner, until he should be lawfully discharged, without committing any manner of escape during the time of restraint. The bond is not that he shall remain a true prisoner until the debt shall be paid. Nor is there any thing upon the face of the bond, or if we look out of it to the known and established laws and usages in that State calling for such a construction. A lawful discharge, in its general signification, will extend to and be satisfied by any discharge obtained under the legislative authority of the State. And it is not unreasonable to consider such prison bonds as given subject to the ordinary and well known practice in Rhode Island, for the legislature to entertain petitions in the manner pursued by the defendant, to obtain the benefit of the insolvent act of 1756, in the manner in which these petitions are received and proceeded upon, as prescribed

by the act of 1798. And, indeed, this cannot strictly be considered a private contract between the parties, but rather as a statute engagement, imposed by an act of the legislature, and as a part of the process under which the defendant was held as a prisoner. And with the full knowledge of this regulation and practice, it is hardly to be presumed that such discharges were not understood to be lawful discharges. And the same remarks will apply to the term escape, in the bond, which can mean no more than a departure from the limits without lawful authority. Suppose the legislature, after the execution of this bond, had enlarged the jail limits? It surely would not have been an escape for the defendant to have availed himself of the enlarged limits, and gone beyond his former bounds. And yet, if the limits prescribed at the time the bond was executed, are to govern the effect and operation of the bond, it would be [*378] an escape. Such bonds may well be considered * as an enlargement of the prison limits, and a mere modification of the imprisonment, according to the provisions of the laws of Rhode Island.

Can it be doubted but the legislature of the States, so far as relates to their own process, have a right to abolish imprisonment for debt altogether, and that such law might extend to present, as well as future imprisonment? We are not aware that such a power in the States has ever been questioned. And if such a general law would be valid under the constitution of the United States, where is the prohibition to be found that denies to the State of Rhode Island the right of applying the same remedy to individual cases? This is a measure which must be regulated by the views of policy and expediency entertained by the state legislatures. Such laws act merely upon the remedy, and that in part only. They do not take away the entire remedy, but only so far as imprisonment forms a part of such remedy. The doctrine of this court in the case of Sturges *v.* Crowninshield, 4 W. 200, applies with full force to the present case. "Imprisonment of the debtor," say the court, "may be a punishment for not performing his contract, or may be allowed as a means for inducing him to perform it. But a State may refuse to inflict this punishment, or may withhold it altogether, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner, does not impair its obligation."

In whatever light, therefore, the question is viewed, no breach of the condition of the bond, according to its true sense and interpretation, has been committed. The liberation of the defendant from confinement, on his giving bond to the sheriff to return to jail in case his petition for a discharge should not be granted, was sanctioned

by the due exercise of legislative power, and was analogous to extending to him more enlarged jail limits, and would not be considered an escape. And both this and the final discharge, so far, at all events, as it related to the imprisonment of the defendant, affected the remedy in part only, and was in the due and ordinary exercise of the powers vested in the legislature of Rhode Island, and was a lawful discharge, and no * escape, and of [* 379] course, no breach of the condition of the bond in question.

It must, accordingly, be certified to the circuit court that the matters set forth in the defendant's amended pleas are sufficient to bar the plaintiff's action.

WASHINGTON, J., dissented. It has never been my habit to deliver dissenting opinions in cases where it has been my misfortune to differ from those which have been pronounced by a majority of this court. Nor should I do so upon the present occasion, did I not believe that the opinion just delivered is at variance with the fundamental principles upon which the cases of Sturges *v.* Crowninshield and Ogden *v.* Saunders, 4 W. 122, 12 W. 213, have been decided. A regard for my own consistency, and that, too, upon a great constitutional question, compels me to record the reasons upon which my dissent is founded.

The great, the intelligible principle upon which those cases were decided, is, that a retrospective State law, so far as it operates to discharge or to vary the terms of an existing contract, impairs its obligation, and is, for that reason, a violation of the tenth section of the first article of the constitution of the United States; but that a law which is prospective in its operation has not this effect, and, consequently, is not forbidden by that instrument. But, if I rightly understand the opinion pronounced in this case, and the facts upon which it is founded, this principle is subverted, and the distinction between retrospective and prospective laws, in their application to contracts, is altogether disregarded. The facts are, that the bond upon which this action is brought bears date the 14th of March, 1814, and the condition is, that the defendant, then a prisoner in the state's jail in Providence, at the suit of the plaintiff, shall continue to be a true prisoner, in the custody and safe keeping of the keeper of the said jail, within the limits of the said prison, until he shall be lawfully discharged. Upon the petition of the defendant to the legislature of Rhode Island, to extend to him the benefit of a certain act passed in the year 1756, an act was passed in February, 1815, which liberated him from his confinement in the jail aforesaid, on his giving a bond to return * to the said jail in case his petition [* 380]

should not be granted; and, by a subsequent act passed in the following year, he was discharged from his debts, upon a surrender previously made of all his estate, for the benefit of his creditors. The plea admits that the defendant did depart from the limits of the jail, and justifies the alleged escape under the above acts of the legislature. The opinion considers those acts as constitutional, and decides that the defendant was lawfully discharged within the terms of his bond.

The case of Sturges *v.* Crowninshield arose upon a contract for the payment of money, from which the debtor was discharged under a subsequent state insolvent law, and this discharge was plead in bar of the action upon the contract. This court decided the plea to be insufficient, upon the ground that the law upon which it was founded impaired the obligation of the contract which was entered into previous to his discharge. The obligation of the contract upon which the present suit was brought is not to pay money, but to continue a true prisoner within the limits of the jail in which he was then confined. A subsequent act of the legislature discharges him from his confinement, and authorizes him to go at large, of which law he availed himself, and under which he justifies the alleged breach of the condition of his bond.

A contract, we are informed by the above case, is an agreement by one or more persons to do, or not to do, a particular thing; and the law which compels a performance of such contract constitutes its obligation. The thing to be done in that case was to pay money, and in this it is to continue a true prisoner; and, at the time it was concluded, the existing law of Rhode Island required him to perform this engagement. A discharge from his debts in the former case, by a subsequent law of the State, impaired that obligation; but this obligation, it is said, is not impaired by a subsequent law, which discharges him from confinement, as well as from all his debts. If the principle which governs the two cases can be reconciled with each other, the course of reasoning by which it is to be effected is quite too subtle for my mind to comprehend it.

It was stated, in the case alluded to, that imprisonment [*381] of *the debtor forms no part of the contract, and, consequently, that a law which discharges his person from confinement does not impair its obligation. This I admit, and the principle was strictly applicable to a contract for the payment of money. But can it possibly apply to a case where the restraint of the person is the sole object of the contract, and continuing within the limits of the prison the thing contracted to be done?

I admit the right of a State to put an end to imprisonment for

debt altogether, and even to discharge insolvent debtors from their debts, by the enactment of a bankrupt law for that purpose. I am compelled, by the case of Sturges *v.* Crowninshield, to make this latter admission, and I voluntarily make the former. But what I insist upon is, that if the law in either case is made to operate retroactively upon contracts, to do what the law discharges the party from doing, it impairs the obligation of the contract, and is so far invalid.

I will now briefly consider the reasons which are assigned for distinguishing this case from that of Sturges *v.* Crowninshield.

It is said that the bond in this case is not, in point of law, a contract, since there is but one voluntary party to it, and a contract cannot exist unless there be at least two parties to it. My answer is, that the law of Rhode Island which authorized the giving of the bond made the creditor the other party, as much so as creditors and legatees are made parties to a bond which the law requires an executor to give. If this answer be not considered as satisfactory, I will add another, which is, that the creditor has adopted it as his contract by putting it in suit.

Again, it is said that the acts which discharged this defendant from his imprisonment, and even from the debt altogether, are not retrospective in their operation, and are not so considered in the State where they were passed.

How they are considered in that State is more than this court can judicially know, and, consequently, that circumstance cannot here form the basis of a judicial determination.

All that we do judicially know is that the act of 1756 *was a temporary law, and expired nearly half a century [* 382] ago. It was, then, in the year 1815, as if it had never existed. An act in this year to revive it, either as a general law or for the purpose of benefiting a particular individual, is the enactment of a new law, which derives all its force from the will of the legislature which enacts it, and not from that of the legislature to which the expired law owed its temporary existence. Is it possible that argument or authorities can be required to prove this proposition? Would the argument upon which the contrary proposition is founded have been adopted in the case of Sturges *v.* Crowninshield, if the discharge had been under an act passed subsequent to the contract, which revived an old expired insolvent or bankrupt law? And am I to understand that contracts for the payment of money, as well as for the restraint of the person of the debtor, may now be discharged in the State of Rhode Island, at any time, by an act to revive the act of 1756 in favor of debtors for whose benefit it may be revived? If this be the

effect of the present decision, (and I confess I cannot perceive how it can be otherwise,) the decision in the case of Sturges *v.* Crowninshield will avail nothing in that State, or in any other of the States in whose code an old deceased insolvent law can be found, which, in the days of its existence, authorized a legislative discharge of a debtor from his debts, or from his prison bounds bond.

Lastly, it is said that this law does no more than enlarge the limits of the prison rules within which the defendant bound himself to continue. And can it be contended that a law which has this effect does not vary (and if it does so, it impairs,) the terms of the contract entered into by the defendant? For what object was he restricted to certain limits, if not to coerce him to pay the debt for which the plaintiff had a judgment and execution against him? And is not this object defeated, and the whole value of his prison bounds contract destroyed, by enlarging the limits to those of the State, of the United States, or of the four quarters of the globe? I shall add nothing further. I have prepared no written opinion, my object in declaring my dissent from that which has been delivered [* 383] being not so much to prove * that opinion to be wrong, as to vindicate my own consistency.

Certificate, that the matters set forth in the defendant's pleas are sufficient to bar the plaintiff's action.

9 P. 329.

THE COLUMBIAN INSURANCE COMPANY, Plaintiffs in Error, *v.* CATLETT, Defendant in Error.

12 W. 383.

A policy "at and from A. to T. and two other ports in the West Indies, and back to her port of discharge, in the United States, upon all lawful goods," &c., being construed with reference to the known course of the trade, covers the return cargo.

Delay to accomplish the objects of the voyage by selling the cargo reasonably, and according to the known course of the trade, is not a deviation.

If a sale of a perishable cargo becomes necessary, in consequence of a peril of the sea, before arrival at the port of destination, it is a case of constructive total loss.

Though a policy requires sixty days' notice of an abandonment, the same letter containing the notice may operate as an abandonment at the end of sixty days.

Where a specific sum was insured on cargo for a round voyage, the whole sum was at risk, though part of the outward cargo had been landed, that amount of property being on board.

Pro rata freight is not a charge on salvage money abandoned to the underwriter.

It is not necessary to aver an abandonment in the declaration.

[* 384] * THIS cause was argued by *Webster* and *Taylor*, for the plaintiffs in error, and by the *Attorney-General* and *Swann*, for the defendant in error.

STORY, J., delivered the opinion of the court.

This is a writ of error to the circuit court of the District of Columbia, sitting at Alexandria.

The original action was upon a policy of insurance, dated the 16th of February, 1822, whereby the Columbian Insurance Company insured the plaintiff ten thousand dollars, lost or not lost, at and from Alexandria to St. Thomas, and two other ports in the West Indies, and back to her port of discharge in the United States, upon all kinds of lawful goods and merchandise, laden or to be laden on board the ship called The Commerce, &c.; beginning the adventure upon the said goods and merchandise from the loading at Alexandria, and continuing the same until the said goods and merchandise shall be safely landed at St. Thomas, &c., and the United States. The goods and merchandise to be valued, as interest may appear. The policy contained the usual risks; and the premium agreed on was three and three quarters per cent., to return half per cent. for each port not used or attempted, and no loss happens. There are other provisions in the policy, which will be hereafter commented on. The breach alleged in the declaration is a total loss by perils of the seas, with the usual averments of notice and non-payment.

The trial was had upon the general issue, and a verdict found by consent for the plaintiff, for $10,000, subject to the opinion of the court upon the demurrer to evidence filed in the case. It was further agreed that if it should be the opinion of the court that the plaintiff was not entitled to recover the full amount of the insurance, but is entitled to an average loss, then a reference to ascertain that average, or to modify the amount of the verdict in any *other [*385] respect as to the sum, should be made to an auditor, and judgment should be given for the sum finally reported and confirmed by the court, subject, however, to the exceptions of either party to any opinion of the court on that subject. The reference was accordingly made, and, upon the coming in of the auditor's report, the court pronounced its opinion and gave judgment for the plaintiff for $7,656.57, with interest from the 14th of October, 1822.

From the demurrer to evidence it appeared that the ship sailed from Alexandria on her voyage about the 14th of February, 1822, having on board a cargo of 2,297½ barrels of flour, of the invoice price of $16,887.32, both ship and cargo being owned by the plaintiff. On the 21st of March she arrived in safety with her cargo at St. Thomas, having met with no accident; and she continued at that port until the 30th of May following, for the purpose of selling her cargo, and for no other cause. During this period the master, who was also consignee, sold by retail 509½ barrels; being limited, by his instruc-

tions, to eight dollars per barrel, and not being able to procure that price for the residue of the cargo, he sailed, on the 31st of May, for Cape Haytien with it, and had also on board some doubloons, amounting to $480, part of the proceeds of the former sales. He might have sold his whole cargo, at from $7.50 to $7.75, at St. Thomas. The 509½ barrels of flour sold at St. Thomas, according to the invoice price, amounted to $3,512.99, leaving the value of the cargo on board, exclusive of the doubloons, at the time of sailing from that port, according to the invoice, at $12,328.25.

On the 6th of June the ship, with her cargo, arrived off Cape Haytien, and, the captain having gone on shore, the ship stretching too far in, took the ground and was wrecked. In consequence of this disaster, 155 barrels of flour were totally lost, 1,633 were got on shore, part without injury, but the greater part damaged, and the whole was sold. The gross amount of the sales at Cape Haytien was $9,391.34; the expenses of salvage, including commissions on sales $4,124.72; the proportion of the captain's expenses attach-
[*386] ing on the cargo, $285.78. Of the proceeds of the *sales at Cape Haytien, the sum of $4,953.89 was invested in coffee, which was shipped to Baltimore, where it produced only $3,517.40. The plaintiff makes a claim for freight of the outward cargo of $2,104.25, as a proper deduction from the proceeds.

As soon as the plaintiff heard of the loss, he sent the following letter to the Insurance Company, under date of the 5th July, 1822: "Gentlemen, having received a letter from Captain M'Knight, (the master,) informing me that the ship Commerce was lost, I abandon the proportion of the cargo that your office was interested in. Respectfully, &c." The captain's protest, and the survey of the ship, were also exhibited to the company, on the 14th of August. The abandonment was never finally accepted by the directors, but sundry negotiations took place between them and the plaintiff, which, however, led to no effectual arrangement.

The first question arising in this case is upon the true construction of the policy itself as to the voyage insured. Is it an insurance upon the original cargo only, from the time of its loading until its final discharge, or is it an insurance upon every successive cargo, which is taken on board in the course of the voyage out and home, so as to cover the risk of a return cargo, the proceeds of the sales of the outward cargo? The argument in behalf of the defendant is, that the risk applies upon the terms of the policy only to the original cargo, laden at Alexandria. The terms of the policy are, on a voyage, "at and from Alexandria to St. Thomas and two other ports in the West Indies, and back to her port of discharge in the United States, upon

all lawful goods and merchandise laden or to be laden on board the ship, &c.; beginning the adventure upon the said goods and merchandise, from the lading at Alexandria, and continuing the same until the said goods and merchandise shall be safely landed at St. Thomas, &c., and the United States aforesaid." It is supposed that those words tie up the adventure to the original cargo shipped at Alexandria, because the risk is to attach on the same at that port, and to continue on the same until safely landed at St. Thomas, &c., and the United States. Perhaps a very strict grammatical construction might lead to such a conclusion. But policies have never been construed *in such a strict and rigid manner. The in- [*387] strument itself is somewhat loose in its form, and has always received a liberal construction with reference to the nature of the voyage and the manifest intent of the parties. What is the nature of the present voyage? It is upon the face of the policy plainly an insurance upon all lawful goods, not only for the outward voyage to the West Indies, but for the homeward voyage to the United States. The underwriters must be presumed, equally with the assured, to know the nature and course of such a voyage. It is for the purpose of trade, and the exchange of the outward cargo, by sale or barter, for a return cargo of West India productions. If we could shut our eyes to the knowledge of this fact, belonging, as it does, intimately to the history and commercial policy of the nation itself, as disclosed in its laws, the whole evidence in the case furnishes abundant proofs of its notoriety. The true meaning of the policy is to be sought in an exposition of the words, with reference to this known course and usage of the West India trade. The parties must be supposed to contract with a tacit adoption of it as the basis of their engagements. The object of the clause under consideration may be thus rationally expounded, as intended only to point out the time of the commencement and termination of the risk on the goods, successively, and at different periods of the voyage, constituting the cargo. It would be pushing the argument to a most unreasonable extent, to suppose that the parties deliberately contracted for risks on a homeward voyage, on goods which, according to the known course of the trade and the very nature of the commodities, were not and could not be intended to be brought back to the United States. We are of opinion that the policy was for the whole voyage round, and covered any return cargo taken on board at any of the designated ports in the West Indies. This is not like the cases cited at the bar, where a policy on goods at and from a particular port, beginning the adventure from the loading thereof, has been held not to cover goods taken on board at an antecedent port. Those are all cases of insurance upon a

single passage, unaffected by any known course or usage of trade to explain the intentions of the parties.

[* 388] * The next question is, whether the delay at St. Thomas for seventy days was not so unreasonable as to constitute a deviation. Without question, any unreasonable delay in the ordinary progress of the voyage avoids the policy on this account. But what delay will constitute such a deviation, depends upon the nature of the voyage and the usage of the trade. It may be a very justifiable delay to wait in port and sell by retail, if that be the course of business, when such delay would be inexcusable in a voyage requiring or authorizing no such delay. The parties, in entering into the contract of insurance, are always supposed to be governed in the premium by the ordinary length of the voyage and the course of the trade. That delay, therefore, which is necessary to accomplish the objects of the voyage according to the course of the trade, if *bonâ fide* made, cannot be admitted to avoid the insurance. In the present case it is proved that the stay at St. Thomas was solely for the purpose of selling the cargo, and for no other cause. But it is said that a sale might have taken place at St. Thomas, of the whole cargo, if the orders of the owner had not contained a direction to the master limiting the sale at St. Thomas to the price of eight dollars, and that this limitation was the sole cause of the delay, and was unreasonable; that the master ought, under the circumstances, to have sold at a lower price, or have immediately elected to go to another port. We are of a different opinion. In almost every voyage undertaken of this nature, where different ports are to be visited for the purposes of trade and to seek markets, it is almost universal for the owner to prescribe limits of price to the sales. Such limitations have never hitherto been supposed to vary the insurance or the rights of the party under it. It cannot be that the master, if entitled to go to a single port only, is bound to sell at whatever sacrifice, as soon as he arrives at that port, and within the period at which he may unload, and sell, and reload a return cargo. He must, from the very nature of the case, have a discretion on this subject. If he arrives at a bad market, he must have a right to wait a reasonable time for a rise of the market, to make suitable inquiries, and to try the effect of partial and limited sales. He is not bound to sell the whole

[* 389] * cargo at once, whatever be the sacrifice, and thus frustrate the projected adventure. In short, he must exercise, in this as in all other cases, a sound discretion, for the interest of all concerned; and, if it be fairly and reasonably exercised, it ought not to be deemed injurious to rights secured by the policy. It is as much the true interest of the owner to sell in a reasonable time and with

all proper dispatch, as it is for the underwriters. To be sure, if the owner should limit the price to an extravagant sum, or the master should delay after all reasonable expectations of a change of market were extinguished, such circumstances might properly be left to a jury to infer a delay amounting to a deviation. And here, again, as on the former point, it may be remarked that every underwriter is presumed to know the ordinary course of the trade, and to regulate his proceedings accordingly.

But, it is said that there is no sufficient evidence of the usage of trade in the present case. It is to be remembered that this is a case which comes before this court upon a demurrer to evidence. The plaintiff was not bound to have joined in the demurrer without the defendant's having distinctly admitted, upon the record, every fact which the evidence introduced on his behalf conduced to prove; and that when the joinder was made, without insisting on this preliminary, the court is at liberty to draw the same inferences in favor of the plaintiff, which the jury might have drawn from the facts stated. The evidence is taken most strongly against the party demurring to the evidence. This is the settled doctrine in this court, as recognized in Pawling *v.* The United States, 4 C. 219, and Fowle *v.* The Common Council of Alexandria, 11 W. 320. The testimony in the present case does not, in direct terms, (as has been justly stated at the bar,) establish the general usage of the West India trade. The witnesses do not, generally, speak to a usage, *eo nomine*. But it cannot be denied that its scope and object are to establish the usage, by an enumeration of facts and voyages, by persons experienced in the trade, and referring to their own knowledge and general information. It thus conduces, indirectly, to prove the usage; and as it is altogether one way, it is *certainly such that a jury might [* 390] infer a usage from it. And if so, this court may infer it.

We consider it, then, as a fair deduction from this testimony, that considerable delays in port in the West India trade are not uncommon, for the purpose of taking the advantages of the market, and that sales by retail are within the usage. There are no facts from which this court can infer that the delay in the present case was unreasonable or unusual; and, consequently, we cannot admit that the delay amounted to a deviation. The case of Oliver *v.* The Maryland Insurance Company, 7 C. 487, is in no respect inconsistent with this doctrine. One question in that case was, whether the delay at Barcelona, for the purpose of taking in a return cargo, was a deviation. The court below instructed the jury that it was not, if the vessel did not remain longer in that port than the usage and custom of trade at that place rendered necessary to complete her cargo. This court was

of opinion that the instruction was, in substance, correct. The only difficulty which arose was from the terms of the instruction, which seemed to limit the right, not to the time necessary to take in the cargo, but to a particular period, regulated by the usage of trade. The chief justice there said: "There is some doubt spread over the opinion in this case, in consequence of the terms in which it is expressed. The vessel might certainly remain as long as was necessary to complete her cargo, but it is scarcely to be supposed this was regulated by usage and custom. The usages and customs of a port or of a trade, are peculiar to a port or trade. But the necessity of waiting, where a cargo is to be taken on board, until it can be obtained, is common to all ports and all trades. The length of time frequently employed in selling one cargo and procuring another, may assist in proving that a particular vessel has or has not practised unnecessary delays in port, but can establish no usage by which the time of remaining in port is fixed. The substantial part of the opinion, however, appears to have been, and seems so to have been understood, that the plaintiff could not recover, unless the jury should be of opinion that the vessel did not remain longer at Barcelona than was necessary to complete her cargo, of which neces-
[* 391] sity the time * usually employed for that purpose might be evidence." This case, therefore, recognizes the right to wait in port for the purpose of selling one cargo and procuring another and the reasoning is employed solely to avoid a criticism founded upon some ambiguity of phrase peculiar to that case. On the other hand, the cases cited at the bar abundantly prove that the usage and course of trade are very material to determine whether the delay be unreasonable or not; Salvador *v.* Hopkins, 3 Burr. 1707; Vallance *v.* Dewar, 1 Campb. 503; Ougier *v.* Jennings, 1 Campb. 505, n. Phillips's Insur. 182, 183.

The next question is, whether there has been a total loss. And this divides itself into two distinct considerations; first, whether the facts of the case created a right of abandonment as for a technical total loss; and, secondly, if so, whether there has been a legal abandonment by the assured.

Upon the first point there is not much room for difficulty. The insurance was not for a single passage, but for the round voyage out and home. The cargo, in the course of the outward voyage, and before it was terminated, (for the master had still an election to go to another port after his arrival at Cape Haytien,) was permanently separated from the ship by the total wreck of the latter. It was a perishable cargo, and much injured by the accident, though it does not appear to be to the amount of one half its value; and it was

liable to still further deterioration. There was a necessity, then, for an immediate sale at Cape Haytien, and the further prosecution of the voyage with that ship or that cargo, became impracticable. It was completely frustrated. Under such circumstances, we are of opinion that, according to the established doctrine of the commercial law, it was a clear case of a technical total loss, on account of the breaking up of the voyage. It is a much stronger case than that of Dorr *v.* The New England Insurance Company, 4 Mass. 232, or Hudson *v.* Harrison, 3 Brod. & Bing. 97, where the court held the losses total.

Was there, then, a due and legal abandonment? The letter of abandonment is admitted to have been sent in due season, and, in its terms, it amounts to a cession of the [* 392] property. Under ordinary circumstances, it would furnish nothing upon which to suspend a doubt. The difficulty arises from two clauses in the particular form of policy used by this company. One is in the following terms: "In case of loss, the same shall be paid in sixty days after proof and adjustment thereof, without any deduction, except the amount of the premium, if then unpaid." The other is, "it is hereby agreed that the insured shall not abandon to the insurers until sixty days have elapsed after having given notice to them of his intention so to do, and of the loss or event which may entitle the insured thereto." The suit was not brought until after more than one hundred and twenty days had elapsed from the abandonment made by the letter of the 5th of July. No question, therefore, arises on this head. But the argument is that the notice of abandonment must, by the terms of the policy, precede the actual abandonment sixty days; and that, in the present case, either no notice at all of such intention has been given, or there has been no actual abandonment at the end of that period. The letter of the 5th of July must either operate as a notice of abandonment, or as actual abandonment; if the former, then there has been no act of abandonment following up the notice; if the latter, then it was made too soon, and contrary to the terms of the stipulation. Such is the stress of the argument.

In construing these clauses, it is material to consider the intention of the parties, as expounded by the general principles of law applicable to the contract. By these principles, the assured, upon an abandonment in due season, for a technical total loss, acquires an immediate right of recovery against the underwriters. He is not bound to wait until they have signified their acceptance or refusal of the abandonment, if it be valid, nor, if accepted, is he bound to wait for payment, but he may immediately commence an action

against them. The object of the first clause is, in the case of an undisputed loss, to obtain a delay of payment for sixty days after the adjustment. But, from its very terms, it can only apply to the case where there has been proof of loss, and also an adjustment.
[*393] If proof of the loss *has been offered, and no adjustment made, as in case of a disputed loss, the clause has been supposed, in the cases cited at the bar, not to apply, Vos *v.* Robinson, 9 Johns. 192; Allegre *v.* Maryland Insurance Company, 6 Harr. Johns. 408. The underwriter is, then, understood to waive the privilege. The true object of the second clause is, to postpone the absolute right of abandonment until sixty days after notice of the loss, so as to enable the underwriters to have time for deliberation upon the acceptance or rejection of it, when made, and to avail themselves of all intermediate events for their benefit. It is wholly unnecessary to consider whether the assured, after a notice of abandonment, can retract, if the underwriters choose to insist upon accepting it; or whether, if, instead of a mere notice, he tenders an unequivocal abandonment, which is accepted by the underwriters within the sixty days, he has, nevertheless, a right to withdraw it, if, within the same period, events turn up in his favor. The present case does not present any facts leading to such a question. The clause is manifestly introduced into the policy for the advantage of the underwriters, and not of the assured. But there is no necessity for giving any very strict interpretation to it to accomplish the fair objects of its provisions. If Mr. Catlett had written a letter to the company, stating to them that he thereby gave notice to them of the loss, and his intention to abandon, and had then added therein that, at the termination of the sixty days, they were to deem that letter an absolute abandonment, there could scarcely be a doubt that such a letter would have been sufficient to satisfy the requirements of the clause. It would give to the underwriters the full benefit of it. If he had written, at the same time, two letters, one containing a notice of his intention to abandon, and the other that he made an abandonment, to take effect at the end of the sixty days after the notice, the same legal result would seem to be justified. The clause does not insist upon an abandonment being made *in præsenti*, by an instrument dated at the expiration of the sixty days; but only that it shall not, in
[*394] point of law, be *obligatory as an abandonment until that period. This seems to us a fair and rational exposition of the intention of the clause. In what respect does the letter of the 5th of July differ from the legal results above stated? It is written with reference to the known language and stipulations of the policy, and it must now be interpreted as it must have been understood, and

indeed, looking to the subsequent proceedings of the company, we may say, as it was understood by both parties. Neither of them seems to have acted upon the supposition that any other or more formal act of abandonment was necessary. The letter gives notice of an intention to abandon, because, in its terms, it includes an actual abandonment. It has a tacit reference to the clause in the policy, and must be deemed as a notice to abandon, and, at the same time, a declaration that it shall operate as an abandonment in the case, as soon as by law it may. In our judgment, it was a continuing act of abandonment, and became absolute at the end of the sixty days. It was an abandonment *in præsenti*, to take effect *in futuro*. Neither the form of the notice, nor the abandonment, is prescribed in the clause. They may be in one or two instruments; they may be in direct terms, or by fair and natural inference. It matters not how they are given or executed; it is sufficient, in point of fact, that they have been given or executed. Our opinion accordingly is that, upon the true interpretation of this last clause in the policy, the letter of the 5th of July was a sufficient notice of an intention to abandon, and that, at the expiration of the sixty days, it operated as an actual abandonment.

The abandonment, then, having been duly made, the next question that arises is, how the loss is to be apportioned. The argument on behalf of the company is, that, as part of the cargo was landed at St. Thomas, the amount risked by them is to be diminished by their proportion of the cargo so landed. In short, that the loss is now to be made up by them with reference to the value of the whole cargo on board, when the risk first attached, and not with reference to the value on board at the time of the loss, notwithstanding it exceeded the amount insured. We are of a different opinion. We think the true intent and object of the policy was to cover *an insurance of $10,000 during the [*395] whole voyage out and home, so long as the assured had that amount of property on board. This is not a policy for a voyage to St. Thomas only, in which case the argument might justly apply. But it is a policy to two other ports on the outward voyage, and also for the homeward voyage. The language of the policy is, that the underwriters insure $10,000 at and from Alexandria, and two other ports in the West Indies, and back to the United States. The premium is apportioned accordingly, for a half per cent. is to be returned "for each port not used or attempted;" and the contemplation of the parties manifestly is, that the premium should be paid during the round voyage upon the full sum insured, and that the assured should have the full benefit of the insurance, so long as he

had $10,000 on board. The intermediate landing of a portion of the cargo in the course of the voyage, was wholly immaterial, in the understanding of the parties, so long as the value on board was sufficient to cover the insurance. If the clause, usual in policies in the eastern States, as to priority of insurance, had been here incorporated, and there had been a subsequent insurance, this, as the prior policy, must have first attached to the extent of the sum insured during the whole voyage. If there had been a subsequent insurance without any such clause, it might form a case for contribution among the various underwriters; but would in no shape affect the rights of the assured. The loss, therefore, must be apportioned between the parties, in the proportion which the sum insured bears to the amount of value on board at the time of the loss; that is, as $10,000 bears to $12,328.25.

The next question is, whether the freight for the outward voyage is to be deducted from the salvage, and allowed the assured, who was owner of the ship as well as the cargo. The amount reported by the auditor is not disputed, and the controversy is, whether it is a charge upon the salvage in the hands of the underwriters. In point of fact, no freight was or could be payable in this case, for the plain reason that the assured was owner of the ship, and there could, therefore, be no lien upon the cargo or its proceeds for the same.

But in point of law the case is not supposed to be varied
[*396] by *this circumstance; for if the freight would be a proper charge on the salvage, if a third person were owner of the ship, in the hands of the assured, there is no reason why it should not be allowed when the assured is owner. We consider the law on this point as conclusively settled. As between the owner of the ship and the owner of the cargo, the former has a lien upon the cargo for all the freight which becomes due and payable to him, whether it be a full or *pro rata* freight. But freight is a charge upon the cargo, against which the underwriters do not, in any event, whether of abandonment with salvage, or of partial loss, undertake to indemnify the owner of the cargo. In order to obtain the salvage, when in the hands of the ship-owner, it may become necessary for the underwriters to pay the amount of the freight, for which they have a lien, as it may to pay any other charge created by the act of the owner of the cargo. But this does not change the nature or extent of the responsibility of the underwriters. As between themselves and the assured, they have a right to deduct the amount so paid from the loss, or to recover it in any other manner, as money paid for the use of the latter. This doctrine was expressly held by the Court of King's Bench, in Baillie *v.* Modigliani, Marshall, Ins.

736, and was confirmed in the fullest manner in this court, in Caze and Richaud *v.* The Baltimore Insurance Company, 7 C. 358.

It only remains to notice an objection made to the form of the declaration. It is said that there is no averment in the declaration that any preliminary proofs of loss were offered to the company, nor of any promise to pay in sixty days after such proofs, according to the terms of the policy, nor that any abandonment or notice was given to the underwriters. It was, in our judgment, wholly unnecessary to aver the latter facts. The abandonment and notice thereof are but matters of evidence to establish the fact of a total loss, which is expressly averred in the declaration. As to the other part of the objection, it proceeds upon a mistake of the terms of the declaration. There is an express averment, after the allegation of the loss, that the company, on, &c., at, &c., had notice thereof, and by means thereof became liable, &c., and in consideration thereof promised *that they would pay the plaintiff the [*397] sum due, "according to the tenor and effect of the said policy of insurance." This is a sufficient averment of a promise to pay according to the stipulations of the policy, and conforms to the general course of precedents in pleading.

Upon the whole, it is the opinion of this court that the judgment of the court below, so far as it allowed the freight of $2,041.25 to the assured, is erroneous and ought to be reversed; and that, in all other respects, it ought to be affirmed.

JOHNSON, J. I concur with the court in all the points decided in this cause, except that which relates to freight. On that, it is my impression that they have misapprehended the case, the question, and the doctrine on which it turns. If so, it is not to be wondered at if it should appear that they have decided upon the authority of adjudications which have no bearing upon the case.

The great disadvantage of Catlett's cause arises from the form in which this question is presented. It is raised in the adjustment of this loss, and comes up so confounded and blended with other matters, that it may well bewilder those who are more conversant with special pleadings than with mercantile statements. To give this question a fair chance with a lawyer, it should have come up on an action instituted by the underwriters to recover of the ship-owner money which arose from the proceeds of an abandoned cargo, and had been remitted to the owner. The questions on the subject of freight would then have been distinctly presented, to wit, whether the freight had been earned, and whether the owner had not a right to set it off against the proceeds of the abandoned cargo. And who

would then entertain a doubt upon the subject? Would the ship-owner have been permitted to pay over the proceeds of the abandoned cargo to the underwriters, and take his remedy against the shipper of the goods? No one can imagine such a doctrine.

It is said that the owner of the cargo shall, in no case, throw the freight upon the underwriter. But there are other interests [*398] always involved in such cases, besides those * of owner and underwriter of the cargo. The ship-owner has his rights, and is not bound to forego his lien on the cargo for the freight, and to look to an absent or insolvent owner or insurer, for indemnity. The master is his agent to receive the freight, as well as agent of the underwriter to remit the salvage, and has a right, nay, is bound, to take care of the interests of his employer.

It is not, therefore, the owner of the cargo who throws the freight upon the underwriter, but the owner of the ship, in the fair exercise of his unquestionable rights. It is clear, then, that the freight may be legally thrown upon the underwriters, by the act of another, even in opposition to the will of the insured. It must, then, be ascertained whether the underwriter who has thus had the freight thrown upon him, by having it deducted from the proceeds of the salvage, can recover it back from the insured. And, in order to examine the question distinctly, we will suppose the case of a payment of a loss before the freight has been thus thrown upon the underwriter; that is, before the proceeds of the salvage have been realized and remitted to the ship-owner, and by him applied to his own freight.

And on what principle could a right in the insurer to recover back, in such an action against the insured, be maintained?

It must be recollected that I am here speaking of the case of an abandonment on a voyage in which freight has been earned. In cases of absolute total loss, no freight can be earned; but in that of a technical total loss, it is well known that freight may be earned. It was not disputed in the argument, that freight, in this case, was earned; and the sufficiency of the abandonment to cast the loss upon the underwriters, is now decided. It is true, the underwriters did not accept the abandonment, and have not, by any express act, accepted the salvage, but they are doing it now, when they lay claim to the proceeds of the salvage remitted to Catlett. If they do not mean to be incumbered with the freight, let them withdraw their claim to the remittance, and Catlett then remains in possession of the cargo, subject to his lien for freight.

The case must, then, be considered as one in which the [*399] * freight is earned, and both the abandonment and salvage accepted; but the proceeds of the latter remitted to the

ship-owner, and by him retained for freight. The question will be, whether, in such a case, the underwriter, who has thus been compelled, in effect, to pay the freight, can recover it, in any form of action, from the insured?

What is the effect of a valid abandonment? The right here contended for is, "the right to pay the freight out of the salvage." It is not true, in a sense applicable to this case, that the insured has no right to throw the freight upon the insurer. The right to abandon positively implies a right to throw the freight upon the underwriter indirectly. It is a right to charge him with a total loss, and if he gets nothing from the wreck, the insured has only asserted his rights against him to their acknowledged extent. It is a right to convert a partial actual loss into a technical total loss.

There is one technical total loss familiarly known to lawyers and merchants, which occurs without abandonment. I mean, where the goods saved are less in value than the freight. There is a complete analogy between the two cases; and, in the latter case, it is expressly adjudged, and so laid down by the best elementary writers, "that the insured has a right to apply the salvage to pay the freight, 2 Marsh. 588, giving credit for the balance only to the underwriter." 2 Marsh. 619. And this is precisely the right which Catlett contends for in the present case.

The right so to apply the salvage results unavoidably from the received and acknowledged consequences of the right of abandonment.

Take the familiar case that occurs every day in time of war. A vessel is captured by an enemy; the insurer on the cargo hears of it, tenders his abandonment, and it is accepted and paid. Who, at that period, would think of making a discount of the freight from the policy? It has not been earned; the insured never was liable for it. But the ship is rescued by her crew, proceeds on her voyage, arrives in safety, and delivers her cargo. Here freight is earned, and must be paid; but by whom? Certainly not by the shipper, for he is divorced from the adventure, and the goods are as *much [* 400] the property of the underwriters as if they had purchased and shipped them.

I have mentioned the case of an accepted abandonment; but the effect of a valid abandonment is the same as if it had been accepted.

In the case at bar, at what point of time did the transfer of interest take place? Certainly, at the instant when the accident happened. The abandonment has the same effect as if the owner and insurer had been on board, and the abandonment made at the moment the misfortune occurred. But freight had not then been earned; the

liability for it had not attached on the insured; and, in the eye of the law, as between him and the underwriter, it could no more attach on him than if the cargo had then gone to the bottom. By the abandonment, it is as to him as if it had gone to the bottom. The law places it in that situation, by declaring it a total loss; and the language of the books on this subject is, "that he ought not to be placed in a worse situation than if the cargo had gone to the bottom." Boyfield and Brown, 2 Str. *et passim.* The insured never incurred the liability for the freight, but the underwriters did; for when the freight was earned, he stood in the place of the insured.

In arguing to show that a liability for the freight never did attach upon the insured, as between him and the underwriter, I have considered the transfer by abandonment as taking place at the moment of the accident. But as to the effect of the abandonment the law goes further, and considers the underwriter in the light of the owner from the commencement of the voyage. Marshall, 601–2. Upon this principle it is that, in the case of a ship insured and abandoned, the underwriter is entitled to whatever freight she may afterwards earn. In the language of Mr. Marshall, "the insurer becomes the legal assignee and owner, and from that time he is liable for all her future outgoings, and, consequently, entitled to all her future earnings."

But if entitled to freight to be earned by the ship, why should not the cargo in his hands remain liable for freight to be afterwards incurred? Liability in the one instance is the correlative of right in the other. It is altogether a mistake to call this charging [* 401] the underwriter with the freight. The *proposition affirmed is that the abandonment does not discharge the cargo from the lien for the freight, to which it was subject in the hands of the insured. Even in the hands of the owner, this liability was not unlimited and unconditional; for if damage is incurred, (by perils of the sea, not from internal decay,) and the salvage goods will not pay the freight in value, the owner is not bound to receive them. Of his interest in this behalf he may judge for himself; it is only when he does receive them that he must pay. And this is precisely the alternative which Catlett holds out to the underwriters.

There is a very strong, and, I think, conclusive adjudication on this subject, to be found in the third volume of the Massachusetts Reports; it is the case of Frothingham *v.* Prince, p. 563, vol. 3.

Wages are to the ship what freight is to the cargo; a contingent liability attaching only on the fulfilment of the contract. In the case referred to, a vessel had been insured from St. Ubes to a port of discharge in the United States. She was cast away on Cape Cod,

and abandoned, but the salvage was sufficient to pay the wages, and the proceeds were remitted to the underwriters. The wages were thus earned, and the owners were compelled to pay them, and now brought suit against the underwriters, counting as well for money had and received, as on the policy. The court decided that the underwriters were bound to refund the money paid for wages by the owner; and the adjudication is in principle precisely what is here contended for in behalf of the plaintiff below. Had the salvage in this case been remitted to the underwriters, and Catlett brought his action for money had and received to recover his freight, it would have been a case on all fours with the present.

It has been supposed that to decide that point against the underwriters, would be to make them liable for two insurances upon receiving one premium; that it would be making them liable for both freight and cargo, upon a premium received only on the cargo.

But, it may be truly said that the inconsistency is on the other side; the argument is directly in point in favor of this claim for freight. This decision is not only making * Catlett liable [* 402] on the cargo, where he was his own insurer for the freight only, but is making him lose his freight after he had earned it, and pay it into the pockets of underwriters who had never insured it, and, therefore, could not acquire it by abandonment.

Suppose another company had insured the freight in this instance, and Catlett had abandoned to them; can it be doubted that, if the proceeds of the salvage had been remitted to the insurers on the cargo, the insurers on the freight would have been entitled to recover it of them? If so, Catlett is entitled to it, for he was his own insurer on the freight. Whether we consider him as having insured, or having earned it, his right is incontestable.

But, it is supposed that the cases of Baillie *v.* Modigliani, and of Caze and Richaud *v.* The Baltimore Insurance Company, have established a contrary doctrine. It appears to me that it is by placing too much confidence in the general language of indexes and marginal notes, and misapprehending the doctrine on which this case turns, that the mistake arises.

We have nothing but a manuscript report of that case of Baillie *v.* Modigliani, and obviously one for which the learned judge, by whom the decision was made, is very little indebted to his reporter. We find in it a mass of correct principles, thrown together without order and without object, and which, I make no doubt, is the skeleton of a very learned and correct opinion; and one which, had we the whole of it, would have furnished a full exposition of the doctrine of this case as well as of that. But, as a decision, the case of

Baillie *v.* Modigliani does not touch the present case. For, in that case, there was no abandonment; the cargo was sold in France, with the benefit of the *pro rata* freight, and the owners wished to charge the underwriters with the freight so paid, as a loss incident to the capture. The question in the present case did not arise there, and could not arise in any case that does not comprise in it both the ingredients of technical total loss, and freight earned. That was a case of partial loss, and what the judge chose to say about the doctrine of the case of a total loss, was mere *gratis dicta*.

[* 403] It would be but charity, or an act of *justice to his learning, to suppose, that if he ever did utter the words attributed to him, to wit: "In case of a loss, total as between the insurer and insured, with salvage, the owner may either take the part saved, or abandon, but in neither case can he throw the freight upon the underwriters; because they have not engaged to indemnify him against it, and have nothing to do with it;" that he had in mind the only sense of those words in which it was possible that he could be correct; which was, "that they could in no case raise a personal charge for freight against the underwriters, where sufficient salvage to pay the freight had never come to their hands."

In any other sense, every merchant on the exchange of London could have told his lordship that he was incorrect. To have obtained from the learned judge a decision applicable to the present cause, the question should have been propounded to him as applicable to a case of technical total loss, with salvage sufficient to cover the freight. The answer would then have been rendered in the language of the books, a language on this subject equally that of lawyers, merchants, and insurers: "Where freight is earned, the insured, in the case propounded, has a right to apply the salvage to the payment of freight;" which is, in so many words, what Catlett contends for in the present cause.

I have reasoned all along on the assumption that it makes no difference in principle whether the vessel and cargo be owned by the same individual, or by different persons. I consider it unquestionable, and even conceded; and, indeed, where the cargo is insured, and the vessel not, after abandonment, the underwriter is, in the eye of the law, an owner *ab origine*, of the cargo, and so distinct from the shipowner. In the case of Caze and Richaud *v.* The Baltimore Insurance Company, 7 C. 358, the counsel attempted to draw a distinction; but the court did not listen to it, and in their decision obviously consider it as immaterial to the question before them.

The case of Caze and Richaud is that which is relied on as most fatal to the claim of freight in the present cause; but to me it ap-

pears as plain as an axiom, that the court have themselves made it a different case, and adjudged * it to be no author- [* 404] ity against the present claim. No one pretends that Catlett could have retained for freight if no freight had been earned. But this is the express decision of the court in the case of Caze and Richaud; and if there was no freight due, of what consequence to the decision was it to say, "that it was no lien upon the cargo," or that "the underwriters could not be made to pay the freight?" The proposition was equally true of the most indifferent person. It is of no consequence as to the bearing of that decision upon this case, to inquire whether the court were right or wrong in deciding that no freight was earned. In so deciding, they have made it a different case from this in an indispensable circumstance, the earning of freight; and plainly shown that they could not have had in contemplation to decide a case in which freight had been earned, which is the present case. I believe myself that we were wrong in every line of that decision; that it will not stand the test of commercial law in any one of the three propositions that it lays down.

The case was this: a vessel and cargo belonging to the same owner sailed from Bordeaux for this country. The cargo was insured, the vessel and freight not. On her voyage, there being war between Great Britain and France, she was captured and carried into Halifax, having then crossed the Atlantic, and gone three fourths of the way on her course to her port of destination. The cargo was abandoned, and vessel and cargo both condemned; but on an appeal, the condemnation was reversed as to both. It is mentioned in the report, that there was no appeal "as to the freight;" but the case is defective in showing whether separate claims were filed for ship and cargo, or the two included in a joint claim by the owner. If joint, the question of freight could not have arisen. But if, as seems probable, from the proceeds of the cargo passing into the hands of the underwriters, the claims were several, then a question may be raised whether the plaintiff was not concluded by his acquiescence in a judicial decision of a competent tribunal against the claim to freight. This would have sustained the judgment against him in this court, had there been no other obstacle to his recovering.

* As the abandonment was accepted, and the sum insured [* 405] paid, the proceeds of the cargo got into the hands of the underwriters, and that suit was instituted for money had and received, to the use of the ship-owner. Had he preferred this claim against the proceeds of the cargo, while lying in the registry of the British admiralty, there cannot be a doubt that it would have been adjudged to him in the distribution of the money among the several claimants.

The three propositions which the opinion affirms in the case of Caze and Richaud, are: —

1. That under no circumstances can the insured throw the freight upon the underwriters, even by abandonment.

2. That no freight, even *pro rata*, was earned in that cause.

3. That the lien of the owner on the cargo for his freight could not affect the question.

On the first point no one will pretend to maintain the affirmative as a general proposition. Losses are either total, partial, or technically total. Upon an actual total loss, no question of freight can ever arise, for there is no freight earned. In the case of partial loss, it is never admitted in adjustments; and this is the full import of the decision in Baillie *v.* Modigliani, and in the case of Gibson *v.* The Philadelphia Insurance Company, 1 Binn. 405, and some others. It is a charge payable after the arrival of goods at their port of destination, and, therefore, never admitted into an adjustment of a partial loss. The cases of technical total loss are of two kinds, as has been before noticed; the one with the other without abandonment. It is not contended that, even in these, the insured can throw the freight upon the underwriters, otherwise than incidentally by abandonment. It has been shown that this is not the principle at all upon which the doctrine insisted on by Catlett rests, and may, therefore, be safely conceded to the case of Modigliani, and all others in which these *dicta* are to be found. The principle is, "that the owner cannot, by his abandonment, devest the lien which the ship-owner has in the goods abandoned." That the underwriter takes the cargo *cum onere*, — a rule which is held sacred even against hostile capture; The Der Mohr, in 3 and 4 Robinson, 129 and 314. The law is that [*406] the master is not bound to part * with his cargo, and fails in his duty if he does, until his freight is paid. Why should he be so bound any more in the case of the transfer by abandonment, than in any other transfer? In that class of technical total losses which arises where the freight incurred exceeds the value of the thing saved, it is expressly decided that the right to apply the salvage to the freight exists; and it is impossible to draw a distinction between that class of cases, and the cases of technical total loss produced by abandonment.

The full latitude of the assertion, therefore, that the insured cannot throw the freight upon the insurer, may be conceded without affecting the right of the party to freight in the present case. The rule is rightly laid down, but its application is mistaken.

The same observations dispose of the third position assumed by the court in Caze and Richaud, since it must be obvious that the lien

of the ship-owner on the cargo is all-important to the question. The right to apply the salvage to the freight grows out of the right of the master to hold the cargo for the freight, whatever change of interest may be produced in it by the act of the owners of the cargo.

The consideration of the second proposition of the court, in Caze and Richaud's case, is not material to this cause, any further than it shows that they considered themselves as deciding a case the very reverse of the present.

Yet so convinced am I that the decision there made against a *pro rata* freight was a hasty decision, that I will conclude with expressing a hope that if ever the subject should again come before this court, it will pause and examine the doctrine without prejudice from that decision, since it is one which involves principles of great interest to the mercantile world, and on which, I will undertake to say, if ever that case should be reviewed, there will be found a vast deal of learning and authority against the decision, and very little to sustain it.

In the very case which the court profess to decide, the case of Baillie *v.* Modigliani, the same *pro rata* charge was paid and acquiesced in by the court and the bar, without a question.

Upon the whole, I never was clearer in any opinion in [*407] my life, than that the decision now rendered against the allowance of freight in this adjustment, is not to be sustained by either principle or authority.

[After the opinion of the court was delivered in this case, the parties ascertained that the auditor's report was incorrect, (by the disallowance of the freight,) in some other respects, and required a different adjustment; and application was accordingly made for a hearing upon these points. The following additional opinion was subsequently delivered by the court.]

STORY, J. In consequence of the former opinion delivered in this cause, the parties have found it necessary to readjust the auditor's report in several particulars not suggested at the former argument. Indeed, upon that argument, the parties assumed that the report was perfectly correct, except as to the item of freight. We have examined the report, and are satisfied that the original plaintiff is entitled to recover the sum of $6,626.18, with interest from the 14th of October, 1822, which is the residue of the sum of $10,000 insured by the company, deducting the premium note and the proportion of salvage belonging to the underwriters, which has been received by the original plaintiff; and the judgment of the circuit court is to be reformed accordingly.

7 H. 595.

THE GENERAL INTEREST INSURANCE COMPANY, Plaintiffs in Error, v. RUGGLES, Defendant in Error.

12 W. 408.

Insurance effected by an owner after a loss, in good faith, is not vitiated by the fact that the master concealed the loss from the owner, with intent to have him procure insurance.

[*409] *THIS cause was argued by *D. B. Ogden* and *Wheaton*, for the plaintiffs in error, and by *Webster* and *Bliss*, for the defendant in error.

THOMPSON, J., delivered the opinion of the court.

This is an action on a policy of insurance, bearing date the 9th of February, 1824, for $3,000, on the sloop Harriet, lost or not lost, at and from Newport, Rhode Island, to, at, and from all ports and places to which she may proceed in the United States, during the term of six months, beginning on the 12th of January, 1824. And also, $600 property on board said sloop, at and from Newport to Charleston, or Savannah, or both. The sloop, whilst proceeding on her voyage, and within the term of six months, to wit, on the 19th of January, was wrecked on Cape Hatteras, and both vessel and cargo wholly lost. An abandonment was in due time made, and a total loss claimed.

The case comes before this court upon a bill of exceptions taken to the directions given by the circuit court for the district of Massachusetts, to the jury, upon the law of the case.

The loss, it will be seen, happened on the 19th of January, and the policy was not effected until the 9th of February. And the question upon the trial turned upon the legal effect and operation of the misconduct of the master after the loss occurred. It was proved that the master, immediately after the loss, for the purpose, and with the design, that the owner, not hearing of the loss of the vessel, might effect insurance thereon, did express his intention not to write to the owner, and took measures to prevent the fact of the loss being known; and that, by the conduct of the master in this particular, and in consequence of the measures adopted by him to suppress intelligence of the loss, knowledge thereof had not reached the parties at the time the policy was underwritten.

[*410] *Upon these facts, the court instructed the jury that, although it was the duty of the master to give information of the loss to his owner as soon as he reasonably could, yet that, in the present case, when there had been an abandonment in due time, for a loss really total, if the owner, at the time of procuring the insurance, had no knowledge of the loss, but acted with entire good

faith, he was not precluded from a recovery. Nor was the policy void by the omission of the master to communicate the information; or by his acts, in suppressing intelligence of the loss; although such omission and acts were wilful, and resulted from the fraudulent design to enable the owner to make insurance after the loss; the owner himself not being conusant of such acts and design at the time of procuring the insurance.

And, under this direction, a verdict was found for the plaintiff, for a total loss.

The statement of the case admits fraudulent misconduct on the part of the master, by reason whereof the policy was effected before any knowledge of the loss reached the assured or the underwriters; but that the assured was entirely ignorant of this misconduct in the master; and that, on his part, there was the most perfect good faith in procuring the policy. Here, then, is a loss thrown upon one of two innocent parties; and the question is, by which is it to be borne? The determination of this question must depend, in a great measure, if not entirely, upon the relation in which the master stood to the respective parties when this misconduct occurred. If the loss of the vessel had been occasioned by any misconduct of the master, short of barratry, whilst in the prosecution of the voyage, and before the loss happened, or if, at the time this misconduct is alleged against him, he was the exclusive agent of the owner for any purposes connected with procuring the insurance, the owner must bear the loss. But if, after the loss, the agency of the master ceased, and was at an end, or if he, in judgment of law, became the agent of the underwriters, his misconduct cannot be chargeable to the assured.

The researches of counsel have not furnished the court with any adjudged cases, either in the English or American courts, which seem to have decided this question. Some *have [*411] been referred to, which have been urged as having a strong bearing upon the point, but which, on examination, will be found distinguishable in some material facts and circumstances.

The precise point, therefore, now before the court, may be considered new, but we apprehend is to be governed by the application of principles understood to be well settled in the law of insurance.

It is important to understand, with precision and accuracy, the relation in which the master stood to the owner of the vessel, at the time when he was guilty of the fraud and misconduct imputed to him. It was after the loss occurred, and at a time when there had been a total destruction of the subject insured, over which the master's agency had extended.

The case has been argued, on the part of the underwriters, as if the

agency growing out of the relation of master and owner of the vessel existed at this time; and that the assured was responsible for all consequences arising from the misconduct of the master; and that the law would presume that whatever was known to the master, must be considered as impliedly known to the owner. These propositions may be true, when applied to a state of facts properly admitting of such application; but cannot be true to the extent to which they have been urged in the present case. If the owner is presumed to know whatever is known to the master, there could be no valid policy effected upon a vessel after she was, in point of fact, lost. Such loss must be known to the master; and if it follows, as a legal conclusion, that it is known to the owner, the policy would be void. Nor, upon this doctrine, could there ever be any insurance against barratry or any other misconduct of the master; for his own acts must necessarily be known to himself. And, indeed, the principle, pressed thus far, would render it impracticable ever to have any guaranty whatever against the fraud or misconduct of an agent, any more than against that of the principal himself. The knowledge of the agent, therefore, with respect to the fact of loss, cannot affect the insurance; nor could the knowledge of the owner himself, with respect to such loss, [*412] affect the insurance in all * cases. Suppose the owner should himself be the master, or be on board, having left orders with an agent to procure insurance in a given time, unless he should hear from him, or have information of the arrival of the vessel at her port of destination; and the vessel should be lost the day before the policy was underwritten, and at a distance that rendered it impossible that information thereof could reach the agent, would such a policy be void? No one could certainly maintain such a proposition. And it is by no means an unfrequent practice to obtain insurance in this way. It is not, therefore, true, as a universal rule, that either the fact of loss, or the knowledge of such fact by the agent or the principal, at the time the policy is procured, will vacate it. But such knowledge must be brought home to some of the parties or agents connected with the business of procuring the insurance; and then the rule properly applies, which puts the principal in place of the agent, and makes himself responsible for his acts. There is, then, the relation of principal and agent in the subject-matter of the contract. But the master, in his character as master, has no authority to procure insurance, nor is he in any sense an agent for such purpose, or in any way connected with it. There may, undoubtedly, be superadded to his powers and duties as master, an agency in other matters, to effect insurance or any other lawful business; but in his appropriate character of master, the law considers him an agent only

for the navigation of the vessel, and in such matters as are connected with, and incident to, such employment. And when the books speak of the master's being agent of the owner, they are to be understood in this sense. He is not to be considered as the general agent of the owner for all purposes whatsoever, that may have connection with the voyage. He is a special agent for navigating the vessel, and can neither bind nor prejudice his principal, by any act not coming properly within the scope and object of such employment. Unless the powers of agents are thus limited, no man could be safe in the transaction of any business through the agency of another. The master, in his character as such, had certainly no authority to procure insurance. He could not bind the owner by such a contract; and if he could not, why should his *acts, totally unconnected with [*413] the business of procuring the insurance, render void a contract entered into in good faith in all parties having any concern in the transaction? It is a general rule, applicable to agencies of every description, that the agent cannot bind his principal except in matters coming within the scope of his authority; and this rule applies particularly to a master and owner of a vessel, and is construed with considerable strictness. Thus, in the case of Boucher *v.* Lawson, Cas. Temp. Hardwicke, 85, and Abbott, 119, the action was against the owner of a ship, for goods lost by the carelessness of the master; and judgment was given for the defendant, because it did not appear that the ship was usually employed in carrying goods for hire. For Lord Hardwicke said, no man could say that the master, by taking in goods of his own head, could make the owners liable.

It is a little difficult to perceive how, in any legal sense, the relation of principal and agent could exist, at the time when the misconduct of the master is alleged to have taken place. So far as he was agent for navigating the vessel, it had terminated by the absolute destruction of the subject. The agency would seem to have ceased from necessity. There was nothing upon which it could act. Had there not been a total loss of the vessel, there would have remained a duty and legal obligation, on the part of the master, to use his best exertions to save what he could from the wreck. But when the subject-matter of the agency becomes extinct, it is not easy to understand how, in any just sense, the agency can be said to survive. There might be a moral duty resting on the master to communicate information of the loss to his owner. But how could there have been any legal obligation binding upon him to do it? The information could neither benefit nor prejudice the owner. It is a general rule of law, that if an injury arises to a principal in consequence of the misconduct of his agent, an action may be sustained

against him for the damage. Could an action in this case be sustained by the owner against the master, for not giving him information of the loss? And, if not, it would seem to follow, as a necessary consequence, that the owner could not be prejudiced by his acts.

[*414] *But suppose the agency of the master not to have terminated, but that, in judgment of law, he was the agent of some one. The question recurs, whose agent was he? The answer cannot admit of a doubt. If agent at all, he was, by operation of law, the agent of the underwriters.

The policy, taking the risk on the vessel and cargo, lost or not lost, although effected after the loss happened, related back; and, by the abandonment, the underwriters were substituted in the place of the assured; and the master, although the agent of the owner until the loss occurred, became, upon the abandonment, the agent of the underwriters. The law upon this subject is well settled, where there is only a technical total loss, and any part of the subject insured remains. The interest in the salvage, whatever it may be, becomes transferred to the underwriters, and the agency is, of course, transferred with the subject; and the agent, thereafter, becomes responsible to the underwriters for the faithful discharge of his trust. No action could be sustained against him by the assured, for the proceeds, or any misconduct in the management thereof. This is not only the settled rule of law, but a contrary doctrine would involve the greatest absurdity. It would be placing the absolute interest in the property in one party, and making the agent accountable for its management to another. No action could be sustained by the assured, for the plain reason that he would have no interest in the subject of the agency.

And if such would be the effect of an abandonment, in case of a technical total loss, there can be no good reason assigned why the rule should not be applied to a loss really total, so far as to transfer whatever agency could remain. So that, whether the agency terminated by the total destruction of the subject, or was transferred by the abandonment to the underwriters, the misconduct of the master could not prejudice the rights of the owner. The connection of principal and agent was dissolved, and they stood towards each other as mere strangers, so far as any legal responsibility could be involved in the conduct of the master. Such we apprehend to be the result of the application of well-settled principles of law

[*415] to the facts and circumstances presented by the bill * of exceptions, in the absence of any authority to govern the case.

We will proceed, then, briefly to notice the cases that have been

supposed to have a bearing upon this question favorable to the underwriters.

In Fitzherbert *v.* Mather, 1 Term Rep. 12, the fraud or concealment relied upon to avoid the policy was, that one Thomas, who, on the 16th of September, and before the loss happened, had written a letter to the agent of the assured, and put it in the post-office, but the mail did not leave the place until the afternoon of the next day, before which time, and on the morning of the 17th, he knew of the loss, but did not withdraw his letter from the post-office, or write another giving information of the loss. Here was, then, a palpable case of gross negligence, if Thomas was to be considered the agent of the assured; and that he was, appears not only to have been assumed by the whole court, but the conclusion is fully warranted by the facts in the case. The assured, in his letter to Fisher, who procured the insurance, directed him to procure it on receiving the bills of lading; which bills, it appears from the case, were to be sent to him by Thomas. The letter and information from Thomas was, therefore, made the foundation of the insurance, and the assured adopted Thomas as his agent, by directing Fuller to procure insurance on receiving the bills of lading from him. It was, therefore, a case of concealment or misrepresentation, by one who stood in the relation of agent to the assured, in the subject-matter of the contract, and whose information lay at the foundation of it.

The case of Stewart *v.* Dunlop, 4 Brown. Parl. Cas. 483, and Park, 320, decided in the house of lords, is very imperfectly reported, the reasons of the judgment, and the ground on which the decision rested, not appearing in any report of the case. Enough, however, is shown, from the statement of facts, to put the decision upon the plain ground that the policy was procured by an agent of the assured, expressly instructed by him to obtain the insurance; he, the agent, having grounds to suspect a loss of the ship, which grounds were not communicated to the underwriter; and, besides this, there was enough to afford strong suspicion that * the [*416] assured himself knew of the loss. The men who arrived at Greenock, knowing of the loss, communicated the information to the friend and intimate acquaintance of the assured, who desired it might be concealed. The same day, this friend held a conversation with the clerk of the assured, and asked him if he knew whether there was any insurance upon the vessel, and if there was any account of her; and, after this, the assured directed this clerk to write to get insurance. The case was open to strong suspicion that the friend of the assured had communicated to him the information he had received of the loss, which would have been a plain ground for de-

claring the policy void. But if such a conclusion is not fairly warranted, there was enough communicated to the clerk to lead him to suspect a loss had happened; and he being the agent employed to procure the insurance, his principal was properly chargeable with all the information he had in relation to the loss.

The case of Andrews and Boerum *v.* The Marine Insurance Company, 9 Johns. R. 32, does not seem to have much bearing upon this point. The decision turned upon a question of fact, whether there was such gross negligence or constructive fraud as to vacate the policy. There was no question of agency involved in the decision. The master of the vessel was part owner and one of the insured, and there was no point raised as to his legal obligation to use ordinary diligence in giving information of the loss to his co-owners; but the court considered that, under the circumstances of the case, he was not chargeable with such negligence as to vacate the policy. But what would have been the result if the doctrine now contended for had been applied to that case? If what is known to the agent is considered as impliedly known to the principal, with much more propriety should the knowledge of one part owner be imputable to all. And the policy must have been held void, because procured with implied knowledge of the loss.

The case of Gladstone *v.* King, 1 Maule & Selw. 35, did not turn upon the question now before the court. The claim was for an average loss upon the ship, in consequence of an injury received before the policy was effected. The defence set up was a [*417] concealment of this fact, or negligence in the * master, in not mentioning it in a letter written to his owners after the injury had been received, and before the policy was underwritten. The policy, however, took up the vessel from the commencement of the voyage, and would, of course, cover the injury. The court considered the concealment material, and that the underwriter ought not to be charged with the loss. They did not, however, decide the policy to be void, which would seem to have been the necessary consequence of a material concealment, according to the principles of insurance law. But they exonerated the underwriter, by the application of what was avowed to be a new principle; that this antecedent damage should be considered an implied exception out of the policy; and this principle, say the court, although new, is adopted, as being consistent with justice and convenience.

It is unnecessary to say, whether, to such a case arising here, we should think proper to adopt and apply this new principle. It is enough for the present to say the principle does not apply to the case now before us. It may, however, be observed that the decision

in that case, so far, at least, as it went to exonerate the insurer from the payment of the average loss, may be supported upon well-settled rules. Information of the injury was withheld by the captain whilst he was acting in his appropriate character of master, and, as such, was the exclusive agent of the owner, and for whose negligence he alone was responsible. And from what fell from Lord Ellenborough, upon the trial, it may be presumed this letter was shown to the underwriter, and, if so, it amounted to a representation that the vessel had sustained no injury at the date of the letter. But unless the case is imperfectly reported, it would be difficult to sustain it upon principles heretofore understood to govern analogous cases.

These are all the cases cited on the argument, on the part of the underwriters, which are supposed to have a bearing upon the present question. We think, however, they are distinguishable, in many material circumstances, and particularly in this, that the fraud or concealment, which was held to vitiate the policies, was traced to some agent, having connection in some way with procuring the insurance; and the *agency was, therefore, concerning [*418] the subject-matter of the contract.

It is, no doubt, true, with respect to policies of insurance, as well as to all other contracts, that the principal is responsible for the acts of his agents; and that any misrepresentation or material concealment by the agent, is equally fatal to the contract, as if it had been the act of the principal himself. But such responsibility must, of necessity, be limited to cases where the agent acts within the scope of his authority. In the present case, the master was clothed with no authority or agency, in any manner connected with procuring insurance. The misconduct charged against him occurred, not whilst he was acting as master, but at a time when the relation of master and owner may well be considered as dissolved from necessity, by reason of a total destruction of the whole subject-matter of the agency; and if not, the master, by the legal operation of the abandonment, became the agent of the underwriters, and was their agent at the time of his alleged misconduct.

It is said that, if this is a new question, the court should adopt such rule as is best calculated to preserve good faith in effecting policies of insurance. But it is by no means clear that this end would be best promoted by adopting the rule contended for on the part of the underwriters. Cases may very easily be supposed where negligence or misconduct, in agents of underwriters, as to matters not immediately connected with effecting a policy, will still have a remote influence which may have a tendency to prejudice the interest of the assured. Such cases, however, as well as those of the description

now under consideration, will most likely be of rare occurrence, and nice and minute distinctions practically operate unfavorably on the business of insurance.

If underwriters feel themselves exposed to fraudulent practices in such cases, the protection is in their own hands, by not assuming any losses that may have happened prior to the date of the policy. It is considered a hazardous undertaking to insure, lost or not lost, and a proportionate premium is demanded, according to the circumstances stated, to show the probability or improbability of the safety of the subject insured.

[* 419] *Although no adjudged cases directly applicable to the one before us have been found, we do not consider this decision as establishing any new principle in the law of insurance, but as grounded on the application of principles already settled, to a new combination of circumstances. *Judgment affirmed.*

Brown and others, Plaintiffs in Error, *v.* The State of Maryland, Defendant in Error.

12 W. 419.

A state law requiring an importer to take a license and pay fifty dollars, before he should be permitted to sell a package of imported goods, is in conflict with that provision of the constitution of the United States which prohibits a State from laying any impost, &c., and also with the clause which declares that congress shall have power to regulate commerce, &c.

Error to the court of appeals of Maryland.

The case is stated in the opinion of the court.

Meredith and the *Attorney-General*, for the plaintiffs in error.

Taney and *Johnson*, contrà.

[* 436] *Marshall, C. J., delivered the opinion of the court.

This is a writ of error to a judgment rendered in the court of appeals of Maryland, affirming a judgment of the city court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an act of the legislature of Maryland. The indictment was founded on the 2d section of that act, which is in these words: "And be it enacted that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, &c., and other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce, shall, before they are

authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them, on demurrer, for the penalty which the act prescribes for the offence; and that judgment is now before this court.

The cause depends entirely on the question whether the legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported.

It has been truly said that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality. The plaintiffs *in [*437] error take the burden upon themselves, and insist that the act under consideration is repugnant to two provisions in the constitution of the United States.

1. To that which declares that "no State shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon States "to lay any imposts or duties on imports or exports." The counsel for the State of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope.

In performing the delicate and important duty of construing clauses in the constitution of our country, which involve conflicting powers of the government of the Union, and of the respective States, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.

What, then, is the meaning of the words, "imposts or duties on imports or exports?"

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them,

because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports?" The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty [*438] on imports," then, is not merely *a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition, show the extent in which it was understood. The limitation is "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the States to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws, goes far in proving that the framers of the constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the object, and passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

From the vast inequality between the different States of the con

federacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by * the statesmen of that day, the [*439] general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of congress. Whether the prohibition to "lay imposts, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a State, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular State. We are told that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view, when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an argument against its * existence, [*440] it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general

safety. The States will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. We do not suppose any State would act so unwisely. But we do not place the question on that ground.

These arguments apply with precisely the same force against the whole prohibition. It might with the same reason be said, that no State would be so blind to its own interests as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our constitution have thought this a power which no State ought to exercise. Conceding, to the full extent which is required, that every State would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded that each would respect the interests of others. A duty on imports is a tax on the article, which is paid by the consumer. The great importing States would thus levy a tax on the non-importing States, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those States whose situation was less favorable to importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the States. When we are inquiring whether a particular act is within this prohibition, the question is not, whether the State may so legislate as to hurt itself, but whether the act is within the words and mischief of the prohibitory clause. It has already been shown, that a tax on the article in the hands of the importer, is within its words; and we think it too clear for controversy that the same tax is within its mischief. We think it unquestionable that such a tax has precisely the same tendency to enhance the price of the article, as if imposed upon it while entering the port.

The counsel for the State of Maryland insist, with great reason, that if the words of the prohibition be taken in their utmost
[*441] latitude, they will abridge the power of taxation, * which all admit to be essential to the States, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist, that entering the country is the point of time when the prohibition ceases, and the power of the State to tax commences.

It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the

object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the States, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.

The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps,
*lost its distinctive character as an import, and has become [*442]
subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and reëxported in the same vessel, goods

landed and carried over land for the purpose of being reëxported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties.

The counsel for the defendant in error have endeavored to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the State cannot regulate it. He may sell by retail, at auction, or as an itinerant peddler. He may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is
[* 443] denied. An importer may * bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

These objections to the principle, if well founded, would certainly be entitled to serious consideration. But we think they will be found, on examination, not to belong necessarily to the principle, and consequently not to prove that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition.

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them or otherwise mixes them with the general property of the State, by breaking up his packages, and travelling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service, as for any other for which he may

apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores *it there, in his own opinion, more [*444] advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledged to reside in the States, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the constitution no further than to prevent the States from doing that which it was the great object of the constitution to prevent.

But if it should be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be

made. This the State has not a right to do, because it is prohibited by the constitution.

[*445] *In support of the argument that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words, export and import. As to export, it is said, means only to carry goods out of the country; so to import, means only to bring them into it. But suppose we extend this comparison to the two prohibitions. The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now suppose the United States should require every exporter to take out a license, for which he should pay such tax as congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think then, that the act under which the plaintiffs in error were indicted, is repugnant to that article of the constitution which declares, that "no State shall lay any impost or duties on imports or exports."

2. Is it also repugnant to that clause in the constitution which empowers "congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes?"

The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own

[*446] *interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those

who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object in the attainment of which the American public took, and justly took that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several States?

This question was considered in the case of Gibbons *v.* Ogden, 9 Wheat. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, *when given in the most [*447] comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

If this be admitted, and we think it cannot be denied, what can be

the meaning of an act of congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell?

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced; that the good sense of the States is a sufficient security against it. The constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? not, how far will it be probably abused? The power claimed by the State is, in its nature, in conflict with that given to congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

[* 448] * We think, then, that if the power to authorize a sale exists in congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article, in his character of importer, must be in opposition to the act of congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to congress to regulate commerce, since an essential part of that regulation, and principal object of it, is, to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.

It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a State to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the States must have some limits. It cannot reach and restrain the action of the national government within its proper sphere.
It cannot reach the administration of *justice in the courts [* 449]
of the Union, or the collection of the taxes of the United
States, or restrain the operation of any law which congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another, for the purpose of reëxportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a State from taxing any article passing through it, from one State to another, for the purpose of traffic? or from taxing the transportation of articles passing from the State itself to another State for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further, or to give additional illustrations of it, because the subject was taken up and considered with great attention, in M'Culloch *v.* The State of Maryland, 4 W. 316, the decision in which case is, we think, entirely applicable to this.

It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

We think there is error in the judgment of the court of appeals of the State of Maryland, in affirming the judgment of the Baltimore city court, because the act of the legislature of Maryland, imposing the penalty for which the said judgment is rendered, is repugnant to the constitution of the United States, and, consequently, void. The judgment is to be reversed, and the cause remanded to that court, with instructions to enter judgment in favor of the appellants.

THOMPSON, J., dissented. It is with some reluctance, and very considerable diffidence, that I have brought myself publicly to dissent from the opinion of the court in this case; and did it not [*450] involve an important * constitutional question relating to the relative powers of the general and state governments, I should silently acquiesce in the judgment of the court, although my own opinion might not accord with theirs.

The case comes before this court on a writ of error to the court of appeals of the State of Maryland, upon a judgment rendered in that court against the defendants. The proceedings in the court below were upon an indictment against the defendants, merchants in the city of Baltimore, trading under the firm of Alexander Brown and Sons, and to recover against them the penalty alleged to have been incurred for a violation of an act of the legislature of that State, by selling a package of foreign dry goods without having a license for that purpose, as required by said act; and the only question which has been made and argued is, whether the act referred to is in violation of the constitution of the United States.

The act in question was passed on the 23d of February, 1822, and is entitled, "A supplement to the act laying duties on licenses to retailers of dry goods, and for other purposes." By the second section, under which the penalty has been recovered, it is enacted, "that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, &c., and other persons selling the same by wholesale, bale, or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license as by the original act is directed, for which they shall pay fifty dollars; and, in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement."

By the original act, passed in 1819, retail dealers in foreign merchandise are required to take out a license; and the supplemental act requires that wholesale dealers should likewise take out a license to sell. These acts being *in pari materia*, are to be taken together, and their effect and operation manifestly is nothing more than to require retail and wholesale dealers in foreign merchandise to take out a license before they should be authorized to sell such [*451] merchandise. * The act does not require a license to import or demand any thing more of the importer than is required of any other dealer in the article imported. The license is for selling, and is general, applying to all persons; that all importers and other persons, selling by wholesale, bale, or package, &c., shall, before they are authorized to sell, take out a license, &c.

I understand it to be admitted that these laws, so far as they relate to retail dealers, are not in violation of the constitution of the United States; and if so, the question resolves itself into the inquiry whether a distinction in this respect between a retail and wholesale dealer in foreign merchandise, can exist under any sound construction of the constitution.

The parts of the constitution which have been drawn in question on the discussion at the bar, and with which the law in question is supposed to be in conflict, are that which gives to congress the power to regulate commerce with foreign nations and among the several States, and that which declares that no State shall, without the consent of congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

It is very obvious that this law can, in no manner whatever, affect the commercial intercourse between the States; it applies purely to the internal trade of the State of Maryland. The defendants were merchants, trading in the city of Baltimore. The indictment describes them as such, and alleges the sale to have been in that place; and nothing appears to warrant an inference that the package of goods sold was not intended for consumption at that place; and the law has no relation whatever to goods intended for transportation to another State. It is proper here to notice that although the indictment alleges that the defendants did import and sell, yet the district attorney, in framing the indictment, very properly considered the offence to consist in the selling, and not in the importation without a license. No one will pretend, that if the indictment had only alleged that the defendants did import a package of foreign dry goods without a license, it could have been sustained. The *act applies to the importer and other [*452] persons selling by wholesale; and the allegation that the defendants did import, is merely descriptive of the double character in which they were dealing, both as importers and sellers. The indictment would, undoubtedly, have been good, had it merely alleged that the defendants sold the package without a license. So that neither the act nor the form in which the complaint is presented, makes any discrimination between the importer and any other wholesale dealer in foreign merchandise, but requires both to take out a license to sell; nor does it appear to me that this law, in any manner infringes or conflicts with the power of congress to regulate commerce with foreign nations. It is to be borne in mind that this was a power possessed by the States respectively before the adoption of the constitution, and is not a power growing out of the establish-

ment of the general government. It is to be viewed, therefore, as the surrender of a power antecedently possessed by the States, and the extent of the surrender must receive a fair and reasonable interpretation with reference to the object for which the surrender was made. This was principally with a view to the revenue, and extended only to the external commerce of the United States, and did not embrace any portion of the internal trade or commerce of the several States. This is not only the plain and obvious interpretation of the terms used in the constitution, commerce with foreign nations; but such has been the construction adopted by this court. In the case of Gibbons *v.* Ogden, 9 W. 194, the court, in speaking of the grant of the power of congress to regulate commerce, say: "It is not intended to comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States; such a power would be inconvenient, and is certainly unnecessary. The enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated, and that something, if we regard the language on the subject of the sentence, must be the exclusively in-
[*453] ternal *commerce of a State. The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself." And, again, (208,) "the acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject, (commerce,) to a considerable extent."

If such be the division of power between the general and State governments in relation to commerce, where is the line to be drawn between internal and external commerce? It appears to me that no other sound and practical rule can be adopted, than to consider the external commerce as ending with the importation of the foreign article; and the importation is complete, as soon as the goods are introduced into the country, according to the provisions of the revenue laws, with the intention of being sold here for consumption, or for the purpose of internal and domestic trade, and the duties paid

or secured. And this is the light in which this question has been considered by this and other courts of the United States, 5 C. 368; 9 C. 104; 1 Mason, 499. This, it will be perceived, does not embrace foreign merchandise intended for exportation, and not for consumption; nor articles intended for commerce between the States; but such as are intended for domestic trade within the State; and it is to such articles only that the law of Maryland extends. I cannot, therefore, think that this law at all interferes with the power of congress to regulate commerce; nor does it, according to my understanding of the constitution, violate that provision which declares that no State shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

*The compensation required by this law to be paid for a [*454] license to sell, cannot be considered an impost or duty, within the sense and meaning of these terms, as used in the constitution. They refer to the foreign duty, and not to any charge that may grow out of the internal police of the States. It may indirectly fall on the imported articles, and enhance the price in the sale; but even this is not an expense imposed on the importer or other seller, but is borne ultimately by the consumer.

But the broad principle has been assumed on the argument, that the payment of the foreign duty is a purchase of the right and privilege, not only of introducing the goods into the country, but of selling them free from any increased burden imposed by the States; and, unless this principle can be sustained, the law in question is not in violation of the constitution.

The counsel, however, aware that the principle thus broadly laid down, if practically carried out to its full extent, would lead to consequences so obviously untenable, that it would at once show the unsoundness of the principle itself, have limited its application to the first wholesale disposition of the merchandise. Can such a distinction, however, be sustained? There is nothing certainly in the letter of the constitution to support it; nor does it fall within any reasonable intendment growing out of the nature of the subject-matter of the provision. The prohibition to the States is against laying any impost or duty on imports. It is the merchandise that is exempted from the imposition. The constitution nowhere gives any extraordinary protection to the importer. So that, if the law was confined to the importer only, he could find no exemption from the operation of state laws. Nor is there, according to my judgment, any rational grounds upon which the constitution may be considered as extending such exemption to wholesale and not to retail dealers

If the payment of the foreign duty is the purchase of the privilege to sell, as well as to introduce the article into the country, where can be the difference whether this privilege is exercised in the one way or the other? The retail merchant often imports his own goods; and why should he be compelled to take out a license to sell,

[*455] *when his neighbor, who imports and sells by wholesale, is exempted. But the distinction is altogether fruitless, and does not effect the object supposed to have been intended, namely, to take from the States the power of imposing burdens upon foreign merchandise, that might tend to lessen or entirely prevent the importation, and thereby diminish the revenue of the United States. It is very evident that no such purpose can be accomplished by limiting the protection to the first sale. It was admitted that after the first sale, and the article becomes mixed and incorporated in the general mass of the property of the country, and to be applied to domestic use, it loses this pretended privilege. But every one knows that whatever charge or burden is imposed upon the retail sale, affects the wholesale indirectly, as much as if laid directly upon the wholesale. The retail dealer takes this charge into calculation in the purchase from the wholesale merchant, and which, of course, equally affects the importation. Suppose the fifty dollars required to be paid by the wholesale dealer was imposed on the retail merchant, would it not equally affect the importation? It would equally increase the burden and enhance the expense of the article when it comes into the hands of the consumer, and on whom all the charges ultimately fall. And if these charges are so increased by the state governments, in any stages of the internal trade, as to check their sale for consumption, it will necessarily affect the importation. So that nothing short of a total exemption from state charges or taxes, under all circumstances, will answer the supposed object of the constitution. And to push the principle to such lengths, would be a restriction upon state authority, not warranted by the constitution.

It certainly cannot be maintained that the States have no authority to tax imported merchandise. But the same principle of discrimination between the wholesale and retail dealer, as to a license to sell, would seem to me, if well founded, to extend to taxes of every description. And it would present a singular incongruity to exempt a wholesale merchant from all taxes upon his stock of goods, and subject to taxation the like stock of his neighbor who was selling by retail.

[*456] *It is laid down in No. 32 of the Federalist, (and, I believe, universally admitted,) "that the States, with the sole

exception of duties on imports and exports, retain authority to tax in the most absolute and unqualified sense; and any attempt, on the part of the national government, to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause in the constitution." Although an impost or duty may be considered a tax, in its most enlarged sense, yet every tax cannot be understood to mean an impost or duty in the sense of the constitution. As here used, it evidently refers to the foreign duty imposed by revenue laws. It would be a singular use of the term impost, to apply it to a tax on real estate; and no one, I presume, would contend that all imported articles upon which the duties have been paid, are exempt from all State taxation in the hands of the consumer. And yet this would follow, if duty and tax are, in all respects, synonymous; for the constitution declares that no State shall lay any duty on imports, namely, the article imported. To avoid these consequences, which are certainly inadmissible, the inhibition to the States must be understood as extending only to foreign duties, and not to taxes imposed by the States, after the imports become articles of internal trade, and for domestic use and consumption; they then become subject to state jurisdiction.

This law seems to have been treated as if it imposed a tax or duty upon the importer, or the importation. It certainly admits of no such construction. It is a charge upon the wholesale dealer, whoever he may be, and to operate upon the sale, and not upon the importation. It requires the purchase of a privilege to sell, and must stand on the same footing as a purchase of a privilege to sell in any other manner, as by retail, at auction, or as hawkers and peddlers, or in whatever way state policy may require. Whether such regulations are wise and politic, is not a question for this court. If the broad principle contended for on the part of the plaintiffs in error, that the payment of the foreign duty is a purchase of the privilege of selling, be well founded, no limit can be set by the States to the exercise of this privilege. The first sale may be made in defiance of all State *regulation; and all State laws regulating sales [*457] of foreign goods at auction, and imposing a duty thereupon, are unconstitutional, so far, at all events, as the sale may be by bale, package, hogshead, barrel, or tierce, &c. And, indeed, if the right to sell follows as an incident to the importation, it will take away all State control over infectious and noxious goods, whilst unsold, in the hands of the importer. The principle, when carried out to its full extent, would inevitably lead to such consequences.

It has been urged with great earnestness upon the court, that if the States are permitted to lay such charges and taxes upon imports,

they may be so multiplied and increased as entirely to stop all importations. If this argument presents any serious objection to the law in question, the answer to it, in my judgment, has already been given; that the limitation, as contended for, of state power, will not effect the objects proposed. Whether this additional burden is imposed upon the wholesale or retail dealer, it will equally affect the importation; and nothing short of a total exemption from all taxation and charges of every description will take from the States the power of legislating so as in some way may indirectly affect the importation.

But arguments drawn against the existence of a power from its supposed abuse are illogical, and generally lead to unsound conclusions. And this is emphatically so when applied to our system of government. It supposes the interest of the people, under the general and state governments, to be in hostility with each other, instead of considering the two governments as parts only of the same system, and forming but one government for the same people, having for its object the same common interest and welfare of all.

If the supposed abuse of a power is a satisfactory objection to its existence, it will equally apply to many of the powers of the general government; and it is as reasonable to suppose that the people would wish to injure or destroy themselves through the instrumentality of the one government as the other.

The doctrine of the court in the case of M'Culloch v.
[* 458] The State of Maryland, 4 W. 316, has been urged * as having a bearing upon this question unfavorable to the validity of the law. But it appears to me that that case warrants no such conclusion. It is there admitted that the power of taxation is an incident of sovereignty, and is coextensive with that to which it is an incident, and that all subjects, over which the sovereign power of a State extends, are objects of taxation. The bank of the United States could not be taxed by the States, because it was an instrument employed by the government in the execution of its powers. It was called into existence under the authority of the United States, and, of course, could not have previously existed as an object of taxation by the States. Not so, however, with respect to imports. They were in existence, and under the absolute jurisdiction and control of the States, before the adoption of the constitution. And it is, therefore, as to them, a question of surrender of power by the States, and to what extent this has been given up to the United States. And it is expressly admitted in that case, that the opinion did not deprive the States of any resources they originally possessed; nor to any tax paid by the real property of the bank, in common with the other real

property within the State; nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution, in common with other property of the same description throughout the State. But the tax was held unconstitutional, because laid on the operations of the bank, and consequently a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution, and this instrument created by the government of the Union. But these objections do not apply to the law in question. The government of the Union found the States in the full exercise of sovereign power over imports. It was one of the sources of revenue originally possessed by the States. The law does not purport to act directly upon any thing which has been surrendered to the general government, namely, the external commerce of the State. It may operate indirectly upon it, to some extent, but cannot be made essentially to impede or retard the operations of the government, not more so than might be effected by a tax on the stock held by individuals in the bank of the United States. And, indeed, the power *of crippling the operations of the government, in [*459] the former case, would not be so practicable as in the latter; for it has the whole range of the property of its citizens for taxation, and to provide the means for carrying on its measures. So that it would be beyond the reach of the States materially to affect the operations of the general government, by taxing foreign merchandise, should they be disposed so to do.

I am, accordingly, of opinion that the judgment of the court of appeals of the State of Maryland ought to be affirmed.

6 P. 515; 11 P. 102, 351; 12 P. 657; 14 P. 614; 15 P. 449; 16 P. 539; 5 H. 504, 554; 7 H. 283; 14 H. 568; 18 H. 331.

The United States v. Gooding.

12 W. 460.

Declarations of a master concerning the voyage, made while endeavoring to hire a mate, and as inducements to him to engage, are evidence against his employer.

Under an indictment framed on the Slave-Trade Act of April 20, 1818, (3 Stats. at Large, 450,) it is sufficient that the owner, through his agents, fitted the vessel; and any preparations which clearly manifest and accompany an intent to prosecute a slave voyage, constitute such a fitting out as to be within the act.

It is not necessary to charge in the indictment the particular acts of preparation.

The crime is a misdemeanor, all are principals, and the words "aid and abet" are not used technically in the act.

A fitting out within the jurisdiction of the United States must be averred.

An averment of an intent that the vessel should be employed is bad; it must be "with intent to employ."

It is competent for the court at the trial to hear objections to the indictment but it is not proper, except under extraordinary circumstances.

[*461] *This was a prosecution in the circuit court of Maryland, against the defendant, Gooding, under the Slave-Trade Act of the 20th of April, 1818. The indictment alleged, 1. That the said Gooding, being a citizen of the United States, after the passing of the act of the congress of the United States, entitled: "An act in addition to an act to prohibit the introduction of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord 1808, and to repeal certain parts of the same," that is to say, after the 20th of April, 1818, to wit, on the 30th day of September, in the year 1824, at the district of Maryland, did fit out for himself, as owner, in the port of Baltimore, within the jurisdiction of the United States and within the jurisdiction of this court, a certain vessel called The General Winder, with intent to employ the said vessel, The General Winder, in procuring negroes from a foreign country, to wit, from the continent of Africa, to be transported to another place, to wit, to the island of Cuba, in the West Indies, to be sold as slaves, contrary to the true intent and meaning of the act of congress in such case made and provided, to the evil example of all others in like case offending, and against the peace, government, and dignity of the said United States.

2. That the said Gooding, a citizen of the said United States, and residing therein, to wit, at the district aforesaid, after the passing of the act of congress aforesaid, to wit, on the day and year last aforesaid, within the jurisdiction of this court, at the district aforesaid, did, for himself, as owner, send away from the port of Baltimore, within the jurisdiction of the United States, a certain other vessel, called The General Winder, with intent to employ the said vessel, The General Winder, in procuring negroes from a foreign

[*462] *country, to wit, from the continent of Africa, to be transported to another place, to wit, to the island of Cuba, to be sold as slaves, contrary to the true intent and meaning of the act of congress in such case made and provided, to the evil example of all others in like case offending, and against the peace, government, and dignity of the United States.

3. That the said Gooding, a citizen of the said United States, and residing therein, after the passing of the act of congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, did aid in fitting out, for himself, as owner, in the port of Baltimore, within the jurisdiction of the United States, to wit, at the district aforesaid, a certain other vessel, called The General Winder, with intent that the said vessel, The General Winder, should be employed in procuring negroes from

a foreign country, to wit, from the continent of Africa, to be transported to another place, to wit, to the island of Cuba, to be sold as slaves, contrary to the true intent and meaning of the act of congress in such case made and provided, to the evil example of all others in like case offending, and against the peace, government, and dignity of the said United States.

4. That the said Gooding, a citizen of the said United States, and residing therein, after the passing of the act of congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, did abet the taking on board, from one of the coasts of Africa, divers negroes, to wit, 290, not being inhabitants, nor held to service by the laws of either of the States or territories of the United States, of a certain other vessel, called The General Winder, for the purpose of selling such negroes as slaves, contrary to the true intent and meaning of the act of congress in such case made and provided, to the evil example of all others in like case offending, and against the peace, government, and dignity of the said United States.

5. That the said Gooding, a citizen of the United States, and residing therein, after the passing of the act of congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, *did, for [*463] himself, as owner, cause to sail from the port of Baltimore, within the jurisdiction of the United States, a certain other vessel, called The General Winder, with intent that the said vessel, The General Winder, should be employed in procuring negroes from a foreign country, to wit, from the continent of Africa, to be transported to another place, to wit, to the island of Cuba, to be sold as slaves, contrary to the true intent and meaning of the act of congress in such case made and provided, to the evil example of all others in like case offending, and against the peace, government, and dignity of the said United States.

6. That the said Gooding, a citizen of the United States, and residing therein, after the passing of the act of congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, did, for himself, as owner, cause to be sent away from the port of Baltimore, within the jurisdiction of the United States, a certain other vessel, called The General Winder, with intent that the said vessel, The General Winder, should be employed in procuring negroes from a foreign country, to wit, from the continent of Africa, to be transported to a certain other place, to wit, to the island of Cuba, to be sold as slaves, contrary to the true intent and meaning of the act of congress in such case

made and provided, to the evil example of all others in like case offending, and against the peace, government, and dignity of the said United States.

7. That the said Gooding, a citizen of the United States, and residing therein, after the passing of the act of congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, did, for himself, as owner, or for other persons, as factor, fit out, equip, load, or otherwise prepare, a certain other ship or vessel, called The General Winder, in the port of Baltimore, within the jurisdiction of the United States, to wit, at the district aforesaid, or did cause the same ship or vessel, The General Winder, to be so fitted out, equipped, loaded, or otherwise prepared, with intent that the said ship or vessel, The General Winder, should be employed in procuring negroes, mulattoes, or persons of color, from a foreign kingdom, place or country, to wit, from the continent of Africa, to be transported to another port or place, [* 464] to wit, to the island of Cuba, in the West Indies, to be there sold, or otherwise disposed of as slaves, or held to labor or service, contrary to the true intent and meaning of the act of congress in such case made and provided, to the evil example of all others in like case offending, and against the peace, government, and dignity of the said United States.

At the trial in the circuit court, the United States offered evidence that the defendant purchased of one M'Elderry the vessel called The General Winder, in the indictment mentioned, and that said vessel was built in the port of Baltimore, also in the said indictment mentioned. They further offered in evidence that at the time said purchase was made, the said vessel was not completely finished, and that the same was finished under the superintendence of a certain Captain John Hill, who was appointed by the defendant master of said vessel on her then intended voyage. They also offered in evidence that the defendant was at the time when the offence laid in the indictment is charged to have been committed, and at the time of his purchase of the said vessel, and ever since, has been a citizen of the United States, and has constantly, from the time of the purchase of the said vessel till the present period, been an actual resident of the said port of Baltimore.

They further offered evidence that after the said purchase, and after the appointment of the said Captain Hill, as master, as aforesaid, the said Hill ordered various fitments for the said vessel, at the said port of Baltimore, which said fitments were furnished for said vessel, and afterwards, on the order of said Hill, were paid for by the defendant. They also offered in evidence that some of these fitments

were peculiarly adapted for the slave-trade, and are never put on board any other vessels than those intended for such trade; a part of such fitments so ordered by Captain Hill and paid for by the defendant, to wit, three dozen of brooms, eighteen scrapers, and two trumpets, were actually put on board the General Winder in the port of Baltimore, the residue of the equipments on board The General Winder, at the time of her departure, being such as are usual on board vessels carrying on trade between said port and the West Indies. And the rest of such fitments, peculiar to the slave-trade as *aforesaid, were shipped at the said port of Balti- [*465] more, on board another vessel, called The Pocahontas, chartered by the defendant: That the said vessel, called The General Winder, sailed from the port of Baltimore, fitted as aforesaid, and with the said Hill as master, on or about the twenty-first day of August, eighteen hundred and twenty-four, having cleared for the island of St. Thomas in the West Indies. That the other vessel, called The Pocahontas, also sailed for St. Thomas, from the port of Baltimore, with the part of the said fitments put on board her as before mentioned, some time in the month of September following. They also gave evidence that both the said vessels, The General Winder and The Pocahontas, afterwards arrived at St. Thomas, and that at that island the said peculiar fitments shipped as aforesaid in The Pocahontas, were there transshipped from said vessel to The General Winder, the said Hill still being the master of the said last-mentioned vessel. They also further offered in evidence that the defendant, about six or seven months after the sailing of The General Winder from the said port of Baltimore, declared in the presence of a competent witness that The General Winder had made him a good voyage, having arrived with a cargo of slaves, the witness thought he said 290, and that he also declared in the presence of the same witness at another time, that he, the defendant, was the sole owner of the said vessel, called The General Winder. They also offered in evidence by another witness, that the defendant had at another time declared in the presence of this other witness, that the said witness, who was a creditor of the defendant, should be paid one half his debt on the arrival of The General Winder at Trinidad de Cuba. The United States, further to support the said indictment, offered to give in evidence to the jury, by a certain Captain Peter L. Coit, that he, Captain Coit, was at St. Thomas while The General Winder was at that island, as before stated, in September, 1824, and that he was frequently on board the said vessel at that time, at St. Thomas; that the said Captain Hill, the said master of The General Winder, then and there proposed to the said witness, Captain Coit, to engage

[*466] on board The General Winder as mate for *the voyage then in progress, and described the same to be a voyage to the coast of Africa for slaves, and thence back to Trinidad de Cuba. That he offered to the said witness seventy dollars per month, and five dollars per head for every prime slave which should be brought to Cuba. That on the witness inquiring who would see the crew paid in the event of a disaster attending the voyage, Captain Hill replied, "Uncle John," meaning, (as witness understood,) John Gooding, the defendant.

The defendant's counsel objected to the admissibility of this evidence, and the judges divided in opinion upon its admissibility. They also moved the court for its opinion upon the following points:—

1. That on the charges contained in the 1st, 2d, 3d, 5th, and 6th counts in the indictment, it is incumbent on the United States to prove that the vessel named or mentioned in the indictment, was fitted out, sent away, caused to sail, or caused to be sent away, with intent to transport negroes from the coast of Africa to the island of Cuba.

2. That evidence that the defendant caused the vessel in question to be fitted out by Captain John Hill or any one else, will not support the first count in the indictment, in which he is charged with fitting her out himself.

3. That the first count charges a fitting out in the port of Baltimore, which, according to the true legal interpretation of the words in an indictment, means a complete equipment; and that evidence of a partial preparation here, and a further equipment at St. Thomas, will not support the charge contained in this count.

4. That the defendant cannot be convicted on the first count, because no offence is legally charged in the said count, it being necessary to specify the particular equipments in the indictment, in order that the defendant may have notice of the particular charge against him.

5. That the defendant cannot be convicted upon the third and fourth counts, because these counts do not charge any offence to have been committed by any principal, to whom the defendant was or could be aiding or abetting; also, that he cannot be convicted upon the fourth count, unless he was actually or constructively [*467] present when the negroes were *taken on board on the coast of Africa; and if the defendant was in Baltimore at the time the said negroes were taken on board on the coast of Africa, he could not aid or abet within the meaning of the fourth section of the act of congress of 20th of April, 1818, upon which he was indicted.

6. That the defendant cannot be convicted on the second, fifth, and

sixth counts in the indictment, because no legal offence is charged in either of these counts, the said counts not charging that The General Winder was built, fitted, equipped, loaded, or otherwise prepared, within the jurisdiction of the United States; and that the said fifth and sixth counts are also defective, in charging the defendant with intent that the vessel should be employed in the slave-trade, instead of charging him with intent to employ her.

7. That the defendant cannot be convicted on the third, fourth, fifth, and sixth counts, unless there be a previous conviction of the principal in the offence, in the said counts mentioned.

The opinions of the judges being divided upon these points, and also upon the question of allowing objections to the form and sufficiency of the indictment to be discussed at the trial before the jury, the questions were certified to this court for final determination.

The *Attorney-General* and *Coxe*, for the United States.

Taney and *Mitchell*, for the defendant.

STORY, J., delivered the opinion of the court.

This is the case of an indictment against Gooding for being engaged in the slave-trade, contrary to the prohibitions of the act of congress of the 20th of April, 1818. It comes before us upon a certificate of division of opinions in the circuit court of the district of Maryland, upon certain points raised at the trial. We take this opportunity of expressing our anxiety, lest, by too great indulgence to the wishes of counsel, questions of this sort should be frequently brought before this court, and thus, in effect, an appeal in criminal cases become an ordinary proceeding, to the mani- [*468] fest obstruction of public justice, and against the plain intendment of the acts of congress. Cases of real doubt and difficulty, or of extensive consequence as to principle and application, and furnishing matter for very grave deliberation, are those alone which can be reasonably presumed to have been within the purview of the legislature in allowing an appeal to this court upon certificates of division. In this very case some of the questions certified may have been argued and decided in the court below upon the motion to quash the indictment; and there are others upon which it is understood that the circuit court had no opportunity of passing a deliberate judgment.

The first question that arises is upon the division of opinions whether, under the circumstances of the case, the testimony of Captain Coit, to the facts stated in the record, was admissible. That testimony was to the following effect: That he, Captain Coit, was

at St. Thomas while The General Winder was at that island, in September, 1824, and was frequently on board the vessel at that time; that Captain Hill, the master of the vessel, then and there proposed to the witness to engage on board The General Winder as mate for the voyage then in progress, and described the same to be a voyage to the coast of Africa, for slaves, and thence back to Trinidad de Cuba; that he offered to the witness seventy dollars per month, and five dollars per head for every prime slave which should be brought to Cuba; that on the witness inquiring who would see the crew paid in the event of a disaster attending the voyage, Captain Hill replied, "Uncle John," meaning, (as the witness understood,) John Gooding, the defendant.

It is to be observed that, as preliminary to the admission of this testimony, evidence had been offered to prove that Gooding was owner of the vessel; that he lived at Baltimore, where she was fitted out; and that he appointed Hill master, and gave him authority to make the fitments for the voyage, and paid the bills therefor; that certain equipments were put on board peculiarly adapted for the slave-trade; and that Gooding had made declarations that the vessel had been engaged in the slave-trade, and had made him [* 469] a good * voyage. The foundation of the authority of the master, the nature of the fitments, and the object and accomplishment of the voyage, being thus laid, the testimony of Captain Coit was offered as confirmatory of the proof, and properly admissible against the defendant. It was objected to, and now stands upon the objection before us. The argument is, that the testimony is not admissible, because, in criminal cases, the declarations of the master of the vessel are not evidence to charge the owner with an offence; and that the doctrine of the binding effect of such declarations by known agents, is, and ought to be, confined to civil cases. We cannot yield to the force of the argument. In general, the rules of evidence in criminal and civil cases are the same. Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. It must, indeed, be shown that the agent has the authority, and that the act is within its scope; but these being conceded or proved, either by the course of business or by express authorization, the same conclusion arises, in point of law, in both cases. Nor is there any authority for confining the rule to civil cases. On the contrary, it is the known and familiar principle of criminal jurisprudence, that he who commands or procures a crime to be done, if it is done, is guilty of the crime, and the act is his act. This is so true, that even the agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants or idiots

employed to administer poison. The proof of the command or procurement may be direct or indirect, positive or circumstantial; but this is matter for the consideration of the jury, and not of legal competency. So, in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. Each is deemed to consent to or command what is done by any other in furtherance of the common object. Upon the facts of the present case, the master was just as much a guilty principal as the owner, and just as much within the purview of the act by the illegal fitment.

The evidence here offered was not the mere declarations of the master upon other occasions totally disconnected [* 470] with the objects of the voyage. These declarations were connected with acts in furtherance of the objects of the voyage, and within the general scope of his authority as conductor of the enterprise. He had an implied authority to hire a crew, and do other acts necessary for the voyage. The testimony went to establish that he endeavored to engage Captain Coit to go as mate for the voyage then in progress, and his declarations were all made with reference to that object, and as persuasives to the undertaking. They were, therefore, in the strictest sense, a part of the *res gestæ*, the necessary explanations attending the attempt to hire. If he had hired a mate, the terms of the hiring, though verbal, would have been part of the act, and the nature of the voyage, as explained at the time, a necessary ingredient. The act would have been so combined with the declarations, as to be inseparable without injustice. The same authority from the owner which allows the master to hire the crew, justifies him in making such declarations and explanations as are proper to attain the object. Those declarations and explanations are as much within the scope of the authority as the act of hiring itself. Our opinion of the admissibility of this evidence proceeds upon the ground that these were not the naked declarations of the master, unaccompanied with his acts in that capacity, but declarations coupled with proceedings for the objects of the voyage, and while it was in progress. We give no opinion upon the point whether mere declarations, under other circumstances, would have been admissible. The principle which we maintain is stated with great clearness by Mr. Starkie, in his Treatise on Evidence, 2 Stark. Evid. pt. 4, p. 60. "Where," says he, "the fact of agency has been proved, either expressly or presumptively, the act of the agent, coextensive with the authority, is the act of the principal, whose mere instrument he is; and then, whatever the agent says within the scope

of his authority, the principal says, and evidence may be given of such acts and declarations as if they had been actually done and made by the principal himself."

[*471] * The other questions arise from the instructions or opinions prayed for by the defendant at the trial, upon matters of law, upon which, also, the judges were divided in opinion.

The first instruction prayed puts the point, whether the burden of proof of the offences charged in the indictment did not rest upon the United States. Without question it does, in all cases where a party stands charged with an offence, unless a different provision is made by some statute; for the general rule of our jurisprudence is that the party accused need not establish his innocence; but it is for the government itself to prove his guilt before it is entitled to a verdict or conviction. This question has been abandoned at the argument here, and is too plain for controversy, since there is no statutable provision altering the general principle in this particular.

The second instruction is conceived in very general terms, so general, indeed, that it cannot be supported if it is to be understood in its obvious sense. It asks the court to instruct the jury that evidence that the defendant caused the vessel to be fitted out by Captain Hill, or any one else, will not support the first count in the indictment, in which the defendant is charged with fitting her out himself. This obviously covers the case where the fitting out is by the instrumentality of any other persons, however innocent of his design, even though the defendant himself should be personally present, either really or constructively, and superintending the whole operations. To this extent it is clearly unmaintainable. But, in a more restrictive sense, it involves the question, whether evidence that the owner commanded, authorized, and superintended the fitment through his agents, without his personal presence, would support this count. We are of opinion in the affirmative. The act of congress does not require that the fitting out should be by the owner personally, without the assistance or agency of others. The act itself is of a nature which forbids such a supposition. The fitment of a vessel is ordinarily, and, indeed, must be done through the instrumentality of others. It is not a single act, but a series of subordinate operations, requiring the coöperation of persons in various trades and arts, all conducing to the same end. It would

[*472] be against the plain sense of the * legislature, to interpret its language to mean that the act which it punishes, and which must or may be done by many in the ordinary course of business, shall only be punishable when the extraordinary fact occurs of its being done by one person. If done by others, under the command

and direction of the owner, with his approbation and for his benefit, it is just as much in contemplation of law his own act as if done by himself. To this extent, at least, the maxim may be safely applied, *qui facit per alium, facit per se.* And it cannot be material whether it be done in his absence from or his presence in the scene. Especially there can be no doubt that the principle ought to be applied with increased force, where the owner resides at the same port or neighborhood, and superintends the course of the operations, even if he does not see them. Even in the highest crimes, those who are present aiding and commanding or abetting, are deemed principals; and, if absent, in treason and in misdemeanors, they are still deemed principals; though it may be necessary, in treason, to lay the overt acts precisely according to the fact, from considerations peculiar to that offence. This instruction, ought, therefore, to have been refused.

The third instruction turns upon the point, whether the fitting out, in the sense of the act of congress, means a complete equipment, so that a partial equipment only will extract the case from the prohibitions of the statute. This objection appears to us to proceed from a mistaken view of the facts applicable to the case. If the vessel actually sailed on her voyage from Baltimore, for the purpose of employment in the slave-trade, her fitment was complete for all the purposes of the act. It is by no means necessary that every equipment for a slave voyage should have been taken on board at Baltimore; or, indeed, that any equipments exclusively applicable to such a voyage should have been on board. The presence of such equipments may furnish strong presumptive proof of the object of the voyage, but they do not constitute the offence. The statute punishes the fitting out of a vessel with intent to employ her in the slave-trade, however innocent the equipment may be, when designed for a lawful voyage. It is the act combined with the intent, and not either separately, which is punishable. Whether the * fitting out be fully adequate for the purposes of a slave voyage may, as matter of presumption, be more or less conclusive; but if the intent of the fitment be to carry on a slave voyage, and the vessel depart on the voyage, her fitting out is complete, so far as the parties deem it necessary for their object, and the statute reaches the case. [*473]

But we are also of opinion, that any preparations for a slave voyage, which clearly manifest or accompany the illegal intent, even though incomplete and imperfect, and before the departure of the vessel from port, do yet constitute a fitting out within the purview of the statute. This was held by this court, upon full consideration, in the

cases of The Emily and Caroline, 9 W. 381, and The Plattsburg, 10 W. 133. Those cases, indeed, arose upon the construction of the slave-trade acts of 1794,[1] 1800,[2] and 1807;[3] but the language of those acts is almost literally transcribed into the statute of 1818, and the construction adopted therein must govern the present case. In either view, therefore, our answer to the third prayer is, that a complete equipment is not necessary to be proved, but any partial preparation which demonstrates or accompanies the illegal intent will bring the case within the statute, and support the charge in the first count of the indictment.

The fourth instruction respects the sufficiency of the averments of the first count; and it is contended that there ought to have been a specification of the particulars of the fitting out, and that it is not sufficient to allege the act itself without them. The indictment, in this respect, follows the language of the statute, and is as certain as that is. We cannot perceive any good reason for holding the government to any greater certainty in the averments of the indictment. The fitting out of a vessel may, and must, consist of a variety of minute acts and preparations, almost infinite in their detail, and the enumeration would answer no valuable purpose to the defendant to assist him in his defence, and subserve no public policy. The fitting out of a vessel is a sort of business which is as clear and definite as any other; and we might just as well, in an indictment upon the act for building a ship with the illegal intent, require that [*474] the government * should particularize the acts of building through their whole details, as those of equipment. The building of a ship is not an act more certain in its nature than the fitting out of a ship. The particular preparations are matters of evidence, and not of averment. Every man may well be presumed to know what are the fitments of a vessel for a voyage, without more particularity. The objection proceeds upon the supposition that ordinary equipments only, though combined with the illegal intent, are not within the act; and that extraordinary equipments only for such a voyage are provided for. This has been already shown to be an incorrect exposition of the statute. It imputes no guilt to any particulars of the equipment, but to the act combined with the illegal intent.

In general, it may be said that it is sufficient certainty in an indictment to allege the offence in the very terms of the statute. We say, in general, for there are doubtless cases where more particularity is required, either from the obvious intention of the legislature, or from the application of known principles of law. At the common

[1] 1 Stats. at Large, 347. [2] 2 Ib. 70. [3] Ib. 426.

law, in certain descriptions of offences, and especially of capital offences, great nicety and particularity are often necessary. The rules which regulate this branch of pleading were sometimes founded in considerations which no longer exist, either in our own or in English jurisprudence; but a rule being once established it still prevails, although if the case were new it might not now be incorporated into the law. So, again, in certain classes of statutes, the rule of very strict certainty has sometimes been applied where the common law furnished a close and appropriate analogy. Such are the cases of indictments for false pretences, and sending threatening letters, where the pretences and the letters are required to be set forth from the close analogy to indictments for perjury and forgery. Courts of law have thought such certainty not unreasonable or inconvenient, and calculated to put the plea of *autre fois acquit*, or *convict*, as well as of general defence at the trial, fairly within the power of the prisoner. But these instances are by no means considered as leading to the establishment of any general rule. On the contrary, the course has been to leave every class of cases to be decided *very much upon its own peculiar circumstances. Thus, [*475] in cases of conspiracy, it has never been held necessary to set forth the overt acts or means, though these might materially assist the prisoner's defence. So, in cases of solicitation to commit crimes, it has been held sufficient to state the act of solicitation, without any averment of the special means. And in endeavors to commit a revolt, which is by statute in England made a capital offence, it has always been deemed sufficient to allege the offence in the words of the statute, without setting forth any particulars of the manner or the means. These cases approach very near to the present; and if any, by way of precedent, ought to govern it, they well may govern it. The case of treason stands upon a peculiar ground; there the overt acts must, by statute, be specially laid in the indictment, and must be proved as laid. The very act and mode of the act must therefore be laid as it is intended to be proved. If the party be only constructively a principal, as an absent and distant coadjutor or leader, it may be necessary to aver the fact accordingly. There is great good sense in the rule which has been laid down, that where the offence is made up of a number of minute acts, which cannot be enumerated upon the record without great prolixity and inconvenience, and the danger of variance, they ought to be dispensed with. The present case is a fit illustration of the rule; the fitting out is a compound of various minute acts, almost incapable of exact specification.

The fifth instruction turns upon a doctrine applicable to principal

and accessory in cases of felony, either at the common law or by statute. The present is the case of a misdemeanor, and the doctrine therefore cannot be applied to it; for, in cases of misdemeanors all those who are concerned in aiding and abetting, as well as in perpetrating the act, are principals. Under such circumstances, there is no room for the question of actual or constructive presence or absence; for, whether present or absent, all are principals. They may be indicted and punished accordingly. Nor is the trial or conviction of an actor indispensable to furnish a right to try the person who aids or abets the act; each in the eye of the law is deemed
[* 476] guilty as a principal. In the *present indictment, the offence is in the third and fourth counts laid by aiding and abetting, in the very terms of the act of congress. If the crime, therefore, could be supposed to be of an accessorial nature, it is truly alleged, according to the fact, and not merely according to the intendment of law. We do not consider that the terms, "aid" and "abet," used in this statute, are used as technical phrases belonging to the common law, because the offence is not made a felony, and, therefore, the words require no such interpretation. The statute punishes them as substantive offences, and not as accessorial; and the words are, therefore, to be understood as in the common parlance, and import assistance, coöperation, and encouragement. These remarks furnish an answer to the seventh instruction, which must share the fate of the fifth.

The sixth instruction is that which has presented the most difficulty. It embraces two propositions; the first is that the second, fifth, and sixth counts in the indictment, ought to have contained an averment that the vessel was built, fitted out, &c., within the jurisdiction of the United States; the second is that the fifth and sixth counts do not allege the offence in the words of the statute, those words being, "with intent to employ the vessel" in the slave-trade, &c., whereas each of these counts avers, "with intent that the said vessel should be employed" in the slave-trade, which imports a very different state of facts. In order to understand these exceptions, it is necessary to attend carefully to the very words of the act of congress. The second section enacts, "that no citizen or citizens, &c., shall, after the passing of this act as aforesaid, for himself, themselves, or any other person or persons whatsoever, either as master, factor, or owner, build, fit, equip, load, or otherwise prepare any ship or vessel, in any port or place within the jurisdiction of the United States, nor cause any such ship or vessel to sail from any port or place whatsoever within the jurisdiction of the same, for the purpose of procuring any negroes, &c., to be transported, &c., as slaves."

The third section enacts, "that every person or persons so building, fitting out, equipping, loading, or otherwise preparing, or sending away, or causing any of the acts aforesaid to be done, with intent to employ *such ship or vessel in such trade or busi- [*477] ness, after the passing of this act, contrary to the true intent and meaning thereof, or who shall in anywise be aiding or abetting therein, shall severally, on conviction thereof by due course of law, forfeit," &c., &c. The first point turns upon the interpretation of the words, "such ship or vessel," in each of these sections. To what do they refer? The only ship or vessel spoken of in either section, is such as have been built, fitted out, &c., in some port or place of the United States. "Such ship or vessel" must, therefore, refer to a ship or vessel so built, fitted out, &c., as its antecendent, or the relative "such" can have no meaning at all. The word is sensible in the place where it occurs, and it is the duty of the court, when it can, to give effect to every word in every enactment, if it can be done without violating the obvious intention of the legislature. This is a penal act, and is to be construed strictly, that is, with no intendment or extension beyond the import of the words used. There is no certainty that the legislature meant to prohibit the sailing of any vessel on a slave voyage, which had not been built, fitted out, &c., within the jurisdiction of the United States. If a foreign vessel, designed for the slave-trade, and fully fitted out for that purpose, were, by accident or design, to anchor in our ports, it would not be reasonable to suppose that the legislature could have intended the sailing of such a vessel from our ports to be an offence within the purview of our laws. Yet, if the construction contended for on behalf of the United States be adopted, that would be the result.

But it is sufficient to say that the word "such" has an appropriate sense, and can be reasonably referred only to the ship or vessel previously spoken of; and such ship or vessel is not merely one built, fitted out, &c., but one built, fitted out, &c., in a port or place within the United States. The whole description must be taken together. If we were to adopt any other construction, we should read the words as if "such" were struck out, and the clause stood, "any ship or vessel." Such a course would not be defensible in construing a penal statute. It is remarkable that in the Slave-Trade Acts of 1794, and of 1807, *the word "such" is omitted, [*478] and seems to have been introduced into the act of 1818, *ex industria*. We must take the law as we find it, and, upon examination of its language, we are of opinion that this exception is well taken. The cases of the United States *v.* Lacoste, 2 Mason, 129, and the United States *v.* Smith, 2 Mason,

143, have been cited at the bar as containing a different opinion expressed in the circuit court in Massachusetts. I owe it in candor to acknowledge that the fact is so; but I have no recollection that the point was made at the argument, and I am confident that it never was insisted upon in the view which has been presented by the argument in this court. My own error, however, can furnish no ground for its being adopted by this court, in whose name I speak on the present occasion.

The other point is equally fatal. There is a clear distinction between causing a vessel to sail, or to be sent away, with intent to employ her in the slave-trade, and with intent that she should be employed in that trade. The former applies to an intent of the party causing the act, the latter to the employment of the vessel, whether by himself or a stranger. The evidence may fully support these counts, and yet may not constitute an offence within the act of congress; for, the employment by a mere stranger would not justify the conviction of the party charged with causing her to sail, or to be sent away, with intent to employ her in the slave-trade, as owner. There is no reason, in criminal cases, why the court should help any such defective allegations. The words of the statute should be pursued.

It remains only to consider the point whether these objections to the sufficiency of the indictment could be properly taken at this stage of the proceedings. Undoubtedly, according to the regular course of practice, objections to the form and sufficiency of an indictment ought to be discussed upon a motion to quash the indictment, which may be granted or refused in the discretion of the court, or upon demurrer to the indictment, or upon a motion in arrest of judgment, which are matters of right. The defendant has no right to insist that such objections should be discussed or decided [*479] during the trial of the facts by the jury. It would *be very inconvenient and embarrassing to allow a discussion of such topics during the progress of the cause before the jury, and introduce much confusion into the administration of public justice. But, we think it is not wholly incompetent for the court to entertain such questions during the trial, in the exercise of a sound discretion. It should, however, be rarely done, and only under circumstances of an extraordinary nature. The circuit court, in the present case, did allow the introduction and discussion of these questions during the trial, and were divided upon the propriety of the practice. We can only certify that the court possessed the authority, but that it ought not to be exercised except on very urgent occasions.

A certificate will be sent to the circuit court of the district of Maryland, according to this opinion

2 P. 358; 19 H. 92.

The United States v. Marchant and Colson.

12 W. 480.

Where two or more persons are jointly charged in the same indictment with a capital offence, they have not a right, by law, to be tried separately without the consent of the prosecutor; but such separate trial is a matter to be allowed in the discretion of the court.

Story, J., delivered the opinion of the court.

The question, which comes before us upon a certificate of a division of opinion of the judges of the circuit court of Massachusetts, is this: whether two or more persons, jointly charged in the same indictment with a capital offence, have a right, by the laws of the country, to be tried severally, separately, and apart, the counsel for the United States objecting thereto, or whether it is a matter to be allowed in the discretion of the court.

We have considered the question, and are of opinion that it is a matter of discretion in the court, and not of right in the parties. And it has become my duty briefly to expound some of the reasons which urge us to that conclusion.

The subject is not provided for by any act of congress; and, therefore, if the right can be maintained at all, it must be as a right derived from the common law, which the courts of the United States are bound to recognize and enforce. The Crimes Act, of 1790,[1] c. 9, provides in the 29th section for the right of peremptory challenge in capital cases; and this right, to the extent of the statute, must, * in all cases, be allowed the prisoners, [*481] whether they are tried jointly or separately. Upon a joint trial, each prisoner may challenge his full number, and every juror challenged as to one, is withdrawn from the panel as to all the prisoners on the trial, and thus, in effect, the prisoners in such a case possess the power of peremptory challenge to the aggregate of the numbers to which they are respectively entitled. This is the rule clearly laid by Lord Coke, Lord Hale, and Sergeant Hawkins, and, indeed, by all the elementary writers; Hawk. P. C. b. 2, c. 41, s. 9; 2 Hale's Pl. C. 268; Co. Litt. 156; Beauchamp's case, 9 Edw. IV. folio 27, pl. 40; Plowd. 100; Kelyng, 9.

One consequence of this, in ancient times, was, that embarrassments often arose, at trials at the assizes, on account of a defect of sufficient jurors. The statute of Westminster 2, c. 38, ordained, "that in one assize no more shall be returned than twenty-four." The common practice, under this statute, used to be for the sheriff to return forty-eight jurors, although the precept named but twenty-

[1] 1 Stats. at Large, 118.

four. It was, indeed, held, at an early period, that the statute of Westminster did not apply to criminal cases; but, notwithstanding this, the usual practice prevailed, unless the court directed a larger number to be returned. And it was not until the reign of George II. that a larger number was required by law to be returned at the assizes. The history of this branch of the subject is very clearly stated in 3 Bac. Abr. tit. Juries, b. 6, and in Kelyng, 16; see, also, 2 Hale's P. C. 263. It is obvious that on joint panels, returned for joint trials, at the assizes, a defect of jurors might, from this limitation, often take place. And it became a question in very early times, whether, under such circumstances, the court had power, against the will of the prisoners, to sever the panel, and to try them severally, if they insisted upon their right of several challenge. It was decided, upon full consideration, that the court had this power. To this effect are the cases in Plowden, 100; in Dyer, 152, b., and in Kelyng, 9; and the doctrine has received the sanction of Lord Hale, and other writers of the highest authority.

[*482] *Whether, then, prisoners, who are jointly indicted, can, against their wishes, be tried separately, does not admit of a doubt. It remains to consider, whether they can insist upon a several trial.

The sole ground upon which this claim can rest must be, if maintainable at all, that they have a right to select their jury out of the whole panel, and that as, upon a joint trial, one may desire to retain a juror who is challenged by another, and, if challenged by one, he must be withdrawn as to all, this right of selection is virtually impaired. But it does not appear to us that this reasoning can, upon the principles of the common law, be supported. The right of peremptory challenge is not of itself a right to select, but a right to reject jurors. It excludes from the panel those whom the prisoner objects to, until he has exhausted his challenges, and leaves the residue to be drawn for his trial according to the established order or usage of the court. The elementary writers nowhere assert a right of this nature in the prisoner, but uniformly put the allowance of peremptory challenges upon distinct grounds. Mr. Justice Blackstone, in his Commentaries, (4 Bl. Comm. 353,) puts it upon the ground that the party may not be tried by persons against whom he has conceived a prejudice, or who, if he has unsuccessfully challenged them for cause, may on that account conceive a prejudice against the prisoner. The right, therefore, of challenge does not, necessarily, draw after it the right of selection, but merely of exclusion. It enables the prisoner to say who shall not try him; but not to say who shall be the particular jurors to try him. The law pre-

sumes that every juror sworn in the case is indifferent, and above legal exception; for, otherwise, he may be challenged for cause. What jurors, in particular, shall try the cause, depends upon the order in which they are called; and the result is a mere incident following the challenges, and not the absolute selection of the prisoner, resulting from his power of challenge.

This view of the general principle of the common law is very much confirmed by other considerations. It is laid down by Hawkins, Pl. Cr. b. 2, c. 41, s. 8, that where several persons are arraigned on the same indictment, and severally plead not guilty, it is in the election of the prosecutor, either to take out joint venires against them all, or *several against each of them. [*483] This plainly supposes that it is in the election of the prosecutor whether there should be a joint or separate trial. If there had been any known right in the prisoner to control this election, it seems incredible that so accurate and learned an author should not have stated it, when the occasion indispensably required him to take notice of a qualification so important to his text. His silence is, under such circumstances, very significant.

But a still more direct conclusion against the right may be drawn from the admitted right of the crown to challenge in criminal cases, and the practice under that right. We do not say that the same right belongs to any of the States in the Union; for there may be a diversity in this respect as to the local jurisprudence or practice. The inquiry here is, not as to what is the state prerogative, but, simply, what is the common law doctrine as to the point under consideration. Until the statute of 33 Edw. I, the crown might challenge peremptorily any juror, without assigning any cause; but that statute took away that right, and narrowed the challenges of the crown to those for cause shown. But the practice since this statute has uniformly been, and it is clearly settled, not to compel the crown to show cause at the time of objection taken, but to put aside the juror until the whole panel is gone through. Hawkins, on this point, says (Pl. Cr. b. 2, c. 43, ss. 2, 3): "If the king challenge a juror before the panel is perused, it is agreed that he need not show any cause of his challenge, till the whole panel be gone through, and it appears that there will not be a full jury without the person so challenged. And if the defendant, in order to oblige the king to show cause, presently challenge, *touts paravaile*, yet it hath been adjudged that the defendant shall be first put to show all his causes of challenge before the king need to show any." And the learned author is fully borne out by the authorities which he cites, and the same rule has been recognized down to the present times. Hale's

P. C. c. 36, p. 271; 3 Bac. Abridg. Jury E. 10; Rex v. Conigsmarke, 9 Howell's State Trials, 1; Rex v. Stapleton, 8 Ibid. 502; Rex v. Borosky, 9 Ibid. 1; Rex v. Grey, Ibid. 127; S. C. T. Raym. 473; Rex v. Grahme, 12 Howell's State Trials, 646; Rex v. Cook, 13 Ibid. 311; Rex v. Horne Tooke, 25 Ibid. 1, 24; 1 Chitty's Crim. Law, 533; Rex v. Campion, 1 Howell's State Trials, 1050.

[*484] *This acknowledged right of peremptory challenge existing in the crown before the statute of 33 Edw. I., and the uniform practice which has prevailed since that statute, to allow a qualified and conditional exercise of the same right, if other sufficient jurors remained for the trial, demonstrate, as we think, that no such power of selecting his jury belongs, or was ever supposed to belong, by the common law, to the prisoner; and that, therefore, he could not demand, as matter of right, a separate trial to enable him to exercise it. In a separate or joint trial, he could at any time be defeated by the crown of such choice, by its own admitted prerogative.

The circumstances already alluded to, of the right of each prisoner on a joint trial to exercise his full right of peremptory challenge, and the small number of jurors usually returned on the panel at the assizes, accounts in a very satisfactory manner for the language used in some of the cases, as to the necessity of directing separate trials where the prisoners refused to join in their challenges. The plain reason was, that otherwise there could be no trial at all, for defect of jurors, at the same assizes; and, therefore, the court, in furtherance of public justice, were accustomed, without the consent of the prisoners, to direct a separate trial. In this way the reason of the practice is understood by Lord Hale, 2 Hale P. C. c. 34, p. 263, and by Hawkins, Hawk. P. C. b. 2, c. 41, s. 9, and by other more recent writers on common law. 1 Chitty's Crim. Law, 535; See Starkie's Crim. Pl. 35. In this manner the language of Lord Holt in Charnock's case, 12 Howell's State Trials, 1454; S. C. 3 Salk. 81, is to be interpreted; for it is manifest that he could not intend that there could not be a joint trial where the prisoners challenged separately, for no rule was better settled in his time than that they could. Indeed, in Rex v. Grahme, 12 Howell's State Trials, 646, 673, the same learned judge uses similar language in a sense which admits of no other interpretation; and this was the answer given to it when cited in a later case for the like purpose.

[*485] *That case is Rex v. Noble and others, in 1713, before Lord Chief Justice Parker, and reported in the State Trials, 9 Hargr. St. Tr. 1; S. C. 15 Howell's St. Tr. 731. In that case, which was an indictment for murder, Noble moved the court for a

separate trial, and the motion was denied. He was convicted, and when brought up for judgment, he moved in arrest of judgment this very matter, that there was a mistrial, because, to use his own words, "we were severed in our challenges, and yet were tried together by the same jury;" and he relied upon the language of Lord Holt, in Charnock's case, as in point. The court overruled the objection, and stated that Lord Holt's language referred solely to the public inconvenience, on account of a probable defect of jurors, and not to any matter of right in the prisoners. Sentence was accordingly passed upon the prisoner, and he was executed. There is a curious and learned commentary appended in a note to this trial, which was printed before the execution of Noble, in which an attempt was made to question the correctness of the decision. But it is therein admitted that Noble's counsel declined to argue the point, though requested; from which we cannot but infer that they thought the objection unfounded. The decision itself has never since been questioned or denied. We have, therefore, in the present case, not merely the absence of any authority in favor of the matter of right, but the course of practice, and the general reasoning deducible from the prerogative of the crown against it; and, lastly, a direct authority, in times when the administration of criminal justice was unsuspected, on the very point.

Such is the substance of the reasons which induce us to decide against the claim as a matter of right. In our opinion, it is a matter of sound discretion, to be exercised by the court with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence.

A certificate is, accordingly, to be sent to the circuit court.

CERTIFICATE. This cause came on, &c. On consideration whereof, it is ordered and adjudged by this court * that it [*486] be certified to the said circuit court, that where two or more persons are jointly charged in the same indictment with a capital offence, such persons have not a right, by the laws of the country, to be tried severally, separately, and apart, the counsel for the United States objecting thereto; but that such separate trial is a matter to be allowed in the discretion of the court before whom the indictment is tried. All which is ordered to be certified, &c.

18 H. 588.

The UNITED STATES v. 350 CHESTS OF TEA. Lippincott and others, Claimants.

12 W. 486.

Under the 68th section of the Collection Act of March 2, 1799, (1 Stats. at Large, 677,) teas, which have been regularly entered, landed, and stored, and the bond of the importer, without surety, given for the duties, pursuant to the 62d section, are not subject to forfeiture by being fraudulently withdrawn from the storehouse and concealed, because the duties have been "secured to be paid."

To cause a forfeiture under the 43d section, the chests must be unaccompanied not only by the proper certificates, but by the marks required by the 39th section.

A lien for duties on goods imported cannot be enforced by a libel *in rem* in the admiralty.

THIS cause was argued by the *Attorney General*, for the United States, and by *Webster* and *Coxe*, for the claimants.

[* 487] WASHINGTON, J., delivered the opinion of the court.

This was a libel filed in the district court of the United States for the southern district of New York, in the name of the United States, against 350 chests of hyson-skin tea, imported from Canton, in the ship Benjamin Rush, as forfeited to the use of the United States. The libel charges that the chests of teas were seized by the collector of the customs for the district of Philadelphia, on the 6th of December, in the year 1825, at the city of New York, on waters navigable from the sea by vessels of ten or more tons burden, and alleges three distinct grounds of forfeiture. First, that the teas, being subject to pay duties, were imported into the United States at Philadelphia, and were there unladen without having been entered at any custom-house, and without a permit from any collector and naval officer, or from any collector of the customs of the United States, the duties imposed thereon not having been paid or secured to

[* 488] * be paid, according to law. Secondly, that the said chests of tea, so imported and subject to pay duties, were afterwards found concealed on board a certain vessel, in the southern district of New York, the said duties not having been paid or secured to be paid, as the law requires. Third, that the said teas, being so imported and subject to duties, were landed at Philadelphia, without the permit of the inspectors of the customs of that district, and were deposited in a storehouse in the said district, agreed on by the collector of the said district and Edward Thomson, the importer of the said teas, who, previous to the landing thereof, elected to give, and did actually execute and give, to the collector of the said district, his bond, without a surety, in double the amount of duties chargeable on the whole amount of teas so imported, in conformity with the provisions of the 62d section of the act to regulate the collection of

duties on imports and tonnage. That the said teas were afterwards clandestinely and fraudulently removed by the said Thomson, or his agents, from the storehouse in which they had been deposited, without any permit from the collector and naval officer of the said district, and without the duties thereon having been first paid, or secured to be paid, and were afterwards found concealed as before mentioned.

To this libel a claim and answer were filed on behalf of Joshua Lippincott, William Lippincott, and Benjamin W. Richards, of Philadelphia, setting forth that the said teas were imported into Philadelphia, by Edward Thomson, who had the same regularly entered and unladen, under a permit duly granted by the collector, in the presence of the proper custom-house officers of that port; and that the said chests of tea were duly inspected, weighed, marked, and numbered, as the law required. That bond was given by Thomson, and the teas were stored, as stated in the libel, in conformity with the 62d section of the law therein referred to; that a certificate, signed and sealed in due form of law, was issued to accompany each of the chests of tea, which certificates were delivered to Thomson, and afterwards came to the possession of the claimants, to whom a bill of sale of the said teas had been made by the said Thomson, as a security for certain large advances made by them to
* Thomson, and that the said certificates were then held by [*489]
them as their property. This bill of sale being set out in the claim, purports to convey to the claimants all Thomson's right in these and other chests of teas, with power to enter the same, from the custom-house stores, and to secure the duties thereon, should it be deemed necessary, as a collateral security for certain notes granted and to be granted to Thomson, by the claimants. The claim then proceeds to state that Thomson, at the same time indorsed to the claimants the invoice and bills of lading of the said teas, and delivered the same, together with the bill of sale and his key of the store in which the teas were deposited, to the claimants; that the chests of tea mentioned in the libel were taken from the storehouse in which they had been deposited without the knowledge or consent of the claimants, nor can they say by what means they were so taken; but they have heard and believe that they were taken out by Thomson, to whom the claimants had delivered the key for another purpose, and were delivered to Francis H. Nicoll, who caused them to be shipped to New York, with full notice at the time that they were the property of the claimants.

The district court decreed the teas to be forfeited to the United States, from which sentence an appeal was prayed to the circuit court, where the same was reversed, and restitution decreed to the

claimants, from which last decree the cause comes before this court by appeal; and the only question to be decided is, whether, upon this libel and the facts agreed upon in the district court, the teas in question are liable to forfeiture for any of the causes stated in the libel.

The first ground of forfeiture alleged in the libel is so satisfactorily disposed of by the facts agreed in the case, that it was not relied upon, or even noticed, in the argument of the cause in this court. The charge is that the teas in question, being subject to the payment of duties upon their importation, were unladen at the port of Philadelphia, without having been entered at any custom-house, and without a regular permit to land the same having been first [* 490] obtained. * The facts agreed admit that they were entered, inspected, bonded, and stored, according to law, and particularly to the 62d section of the Duty Act, as alleged in the claim.

The next alleged cause of forfeiture is that the teas were found concealed on board a certain vessel, the duties thereon not having been paid, or secured to be paid.

This charge is also negatived by the statement of facts, which admits that the teas were not secreted, nor were they found secreted at the time of seizure, on board the vessel where they were seized, but were then and there stowed in the usual and customary manner of stowing such property, when put on board for transportation. It is, nevertheless, insisted, on the part of the United States, that although the conclusion that the teas were not found secreted must now be admitted as a fact not to be controverted in argument, nevertheless, the court is bound to say that, upon a view of the facts agreed in the statement which forms part of this record, they were concealed in point of law, and according to the true intent and meaning of the act of congress, under which the seizure was made. These facts are, that, after the teas were placed in the storehouse agreed upon by the collector and the importer, they were fraudulently removed from thence by some persons other than the claimants, and without their knowledge or consent; and after a regular entry and clearance at the custom-house in Philadelphia, were shipped on board the vessel in which they were seized, and transported to the port of New York, the duties thereon not having been paid or secured, in any other manner than by giving the general bond, and storing the teas according to the provisions of the 62d section of the Duty Act.

This question arises out of the 68th section of the Duty Act, and depends upon the true construction of that section. It declares, so far as concerns this particular case, "that every collector, &c., shall have full power and authority to enter any ship or vessel in which

they shall have reason to suspect any goods, &c., subject to duties, are concealed, and therein to search for, seize, and secure any such goods," &c., and "all such goods, &c., on which the duties shall not have been paid, or secured to be paid, shall be forfeited."

*The argument upon this section is that, after the goods [*491] are stored, according to the provisions of the 62d section, the fraudulent removal of them from the place in which they are so deposited, without a permit, and without paying or securing the duties in the mode prescribed by the act, amounts to a concealment of them, in whatever place and under whatever circumstances they may be found; that the real ground of forfeiture of goods so removed is the non-payment of the duties, or the not securing of the same, according to the provisions of this section; and the concealment of them is merely a circumstance to warrant the custom-house officer in searching for, seizing, and bringing them to adjudication.

The court cannot yield its assent to either of these propositions. The act provides for and defines, by express enactments, the various acts which should draw after them the penalty of forfeiture of the goods imported. Thus, if they be unladen at any other time than in open day, unless by a special license, or at any other time without a permit by the proper officer, they are subject to forfeiture under the 50th section; and the like consequence follows as to distilled spirits, wines, or teas, which are landed without the special permit provided for by the 37th section, or otherwise than under the inspection of the surveyor or other officer acting as inspector of the revenue, contrary to the direction of the 38th section. These are all acts of illegal importation, and, on that ground, the goods are made liable to forfeiture. But after they are regularly entered, landed, bonded, and stored, there is no part of this act which exposes them to this penalty for being illegally withdrawn from the place of their deposit, without a permit from the proper officer, or without the duties thereon being first paid or secured to be paid. Nor would it seem, but for the extraordinary circumstances which have attended these and the other teas mentioned in these proceedings, to have been necessary to devise other guards than those which the 62d section of the act has provided for securing to the United States the payment of the duties. The key of one of the locks, to be placed on the store in which the teas are deposited, is directed to be detained by the inspector, who is *forbidden [*492] to deliver out any part of them without a written permit from the collector and naval officer, to the obtaining of which it is necessary that the duties should be first paid on the parcel which the

owner desires to remove, or should be secured to be paid by a bond with surety or sureties, to the satisfaction of the collector, on the penalty and on the terms prescribed in this section. The security thus provided by the deposit might be lost by the destruction of the articles themselves by fire, or might be jeoparded by the fraudulent, the felonious, or the violent removal of them from the place of their supposed safe custody. But that they should be so removed, with the fraudulent connivance or in consequence of the culpable carelessness of the inspector, or of any other officer of the customs, was a risk which probably did not enter into the contemplation of the legislature. Be this as it may, it is perfectly clear that no provision is anywhere made to meet the case of goods so illegally removed, whether by subjecting them to forfeiture, or by pointing out any other remedy to guard the government against the loss to which those acts might expose it. A remedy, although it may, under certain circumstances, be an inadequate one, is, nevertheless, provided by the general principles of law. The lien of the government for the duties, which attached upon the articles from the moment of their importation, was not and could not be discharged by the unauthorized and illegal removal of the articles from the custody of the inspector, or other custom-house officer having charge of them, and might have been enforced by the ordinary remedies provided by law in similar cases. Whether it could be enforced against a fair *bonâ fide* purchaser of goods, removed from the store by a permit from the proper officers, without notice that the duties were not paid or secured, is a question which does not arise in this case, and upon which no opinion, therefore, is intended to be given.

In order, then, to subject teas illegally removed from the storehouse in which they were deposited to forfeiture, under this count in the libel, it is essential for the United States to prove, upon the trial, not only that the duties for which they were liable were unpaid, or not secured to be paid, but that they were found concealed at [* 493] the time they were seized. A * suspicion of this fact, if honestly entertained by the person searching for and making the seizure, would be sufficient to protect him against any claim for damages in consequence of those acts, although it should afterwards appear on the trial that, in point of fact, the articles were not concealed. But the owner of the goods is not put upon his trial to prove that the duties were paid or secured, until that fact is established. The expressions in the latter part of this section leave no room for doubt upon this point. They are, that "all such goods, &c., on which the duties shall not have been paid, or secured to be paid, shall be forfeited;" that is to say, the goods so concealed and seized

The argument that goods subject to duties are, in the view of the law, and by a fair construction of this section, concealed, wherever and under whatever circumstances they may be found, is equally inadmissible. If that were the intention of the legislature, the offence would consist, not in the concealing of such goods, but in having the possession of them; and the authority to seize, applying to such a case, would no doubt have extended to all goods, wherever found out of their place of deposit, on which the duties had not been paid or secured to be paid. The term concealed, used in this section, is one of plain interpretation, and obviously applies to articles intended to be secreted and withdrawn from public view on account of their being so subject to duties, or from some fraudulent motive.

But if the argument upon this part of the case were well founded, the count in the libel which we are now examining could not be maintained, since we are all of opinion that the duties upon these teas were secured to be paid, within the fair construction of the 62d section of the duty law. By this section, the duties upon all goods imported and subject thereto, are to be paid or secured to be paid, before a permit to land them can be granted. If the importer elect not to pay them, he is at liberty to secure them by bond, with one or more sureties, to the satisfaction of the collector, or the collector may accept his own bond without sureties; but, in the latter case, the goods themselves must be deposited with the proper custom-house officer pointed out in the section. These provisions apply, thus far, to all kinds of * goods. The differ- [* 494] ence, as to the mode of securing the duties between teas imported from China or Europe and other goods, consists in the following particulars. As to the former, the teas, where bond without sureties is given, are to be deposited, at the expense and risk of the importer, in a store to be agreed on by him and the inspector, on which the inspector is to affix two locks, the key of one to be retained by himself, and the other to be kept by the importer; and it is made the duty of the inspector to attend, at all reasonable times, for the purpose of delivering out the teas as the same may be required; but he is forbidden to deliver any part of them without a permit in writing, signed by the collector and naval officer, to the obtaining of which it is required that the duties on the teas to be delivered shall be first paid or secured to be paid, by a bond to be given, with a surety or sureties, to the satisfaction of the collector, for payment of the duties at particular periods mentioned in the section. And in case the duties should not be paid at the period so stipulated in the first bond, or secured to be paid in the manner last specified,

the collector is required to sell, at public auction, so much of the teas as may be necessary, and, after retaining the sum which shall not have been so paid or secured, together with the expenses of sale and safe keeping of the teas, to return the overplus, if any, to the owner thereof.

As to goods other than teas, if the importer elect, instead of paying the duties or securing the same by giving bond with satisfactory sureties, to give his own bond without sureties, the collector is required to accept such bond, together with a deposit of so much of the goods on which the duties are payable, as in his judgment shall be sufficient security for the amount of the duties for which such bond shall have been given, together with the charge of safe keeping and seizing the same, which goods, so deposited, are to be kept by the collector, at the expense and risk of the party on whose account they were deposited, until the sum specified in the bond shall become due; and, if the same be not then paid, so much of the goods deposited as may be necessary to discharge the duties and expenses are to be sold, and the proceeds to be disposed of as in the former case.

[* 495] * From this recital of the most material parts of the above section, it is most apparent that the legislature contemplated the bond of the importer, accompanied by a deposit of all the teas imported, to be kept under the lock and key of the inspector, and subject to the control of the collector and naval officer, until the duties were paid or otherwise secured, as an equivalent security, with a bond and approved sureties, if the importer had elected to give such a bond in the first instance. By no other construction can the express terms of the section be satisfied. The importer has an option allowed him, at the time of making his entry, to secure the duties, instead of paying them. How may he secure them? The section proceeds immediately to point out the two following modes: "On the same terms and stipulations as on other goods imported;" that is to say, by bond, with sureties satisfactory to the collector, or "by his own bond in double the amount of the duties," which latter bond, accompanied by the deposit of the teas, as before mentioned, the collector is required to accept. It is perfectly obvious that this latter security is to be accepted in lieu of and as equivalent to the former. And we may confidently ask, is it not so? The condition of the China trade must be in a deplorable state, and must necessarily be discontinued, whenever the value of the teas imported from that country shall fall below the amount of the duties imposed upon them; and unless such a state of things could have been contemplated, what better security for payment of the duties could have been devised, consistent with the existence of

the trade itself, than the uncontrolled possession of the articles subject to the duties, with the power to sell the same for their discharge, in case they should not be paid when they should become due, or should not be otherwise secured to be paid? As an additional evidence that congress considered this security as at least equivalent to bond with approved securities, this section goes on to provide that the amount of each bond taken for the duties on any teas delivered under a permit from the store after a deposit, shall be indorsed immediately on the original bond given by the importer, specifying the amount of duty secured on the teas delivered out, by whom, and the term of payment. If, *then, the whole quantity of [*496] teas deposited should be withdrawn in the mode prescribed by this section, either at one or at different periods, before the expiration of the term of credit allowed, the United States would have precisely the same security that they would have had, if the importer had, in the first instance, elected to give bond, with approved sureties, instead of his own bond, accompanied by a deposit of the articles themselves subject to the duties.

In consequence of an intimation of the attorney-general that, in case the decision of the court should be against the United States upon what we have called the second count in the libel, he should move to amend the libel by inserting a count under the 43d section of this law, the cause was argued at the bar as if such a count now formed a part of the libel. But, if the above opinion be correct, it is manifest that such a count would not help the case, since, if the duties were secured to be paid according to the provisions of the 62d section, no forfeiture could be decreed under the 43d section. The facts agreed present, besides, an additional reason why such a decree could not properly be made under that section, since they admit that each chest of the teas in question, at the time of seizure, was duly numbered, and had on it all the marks which the law requires, and that the certificates required by the act to accompany each of the chests, remained in the hands of the claimants at Philadelphia. Now, we are all of opinion that to authorize a seizure of teas, and bringing them to adjudication, it is necessary, under the 43d section, not only that the chests should be unaccompanied by the proper certificates, but also that they should be unaccompanied by the marks required to be placed upon them by the 39th section. Both must concur in order to justify a seizure, and to raise such a presumption that the teas are liable to forfeiture as to throw upon the claimant the burden of proving that they were imported according to law, and that the duties thereon were paid, or secured to be paid, in order to avoid a sentence of condemnation.

Enough has already been said to dispose of the third count in the libel, even if it had been pressed in the argument of the [*497] cause, since it is not pretended that there *is any section of the above act which subjects teas to forfeiture, on the ground of their having been clandestinely and fraudulently removed from the store in which they were deposited, by the importer or by any other person, without a permit, and without the duties thereon having been first paid or secured to be paid. It is quite unlikely that a case so extraordinary and disgraceful as that which has given rise to this controversy, was or could have been anticipated by the legislature which enacted the law under consideration. One would have supposed, but for the instance before us, that the act had provided every guard for the safety of the public interest, which any imaginable contingency could have rendered necessary.

The only remaining objection taken to the decree of the circuit court is, that the payment of the duties to which these teas were subject, ought to have been made a condition of their restitution to the claimants, or that they should have been decreed to be sold towards the payment of the duties for which the original bond of Thomson was given, and which remained unpaid.

Admitting that those duties were even now due, which is not the case, we could not yield our assent to the correctness of this objection, even if the prayer of the libel had corresponded with such a decree, and even if the teas in question were liable for duties beyond those properly chargeable against the quantity seized, which is by no means conceded.

By the 9th section of the Judiciary Act,[1] the district courts have exclusive original cognizance, amongst other subjects, of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade, of the United States, where the seizures are made on waters navigable from the sea by vessels of a specified burden, within their respective districts, as well as upon the high seas; and, also, of all seizures made on land, or other waters than as aforesaid, and of all suits for penalties and forfeitures incurred under the laws of the United States. They have, also, cognizance concurrent with the state courts, of all suits [*498] at common law where the United *States sue, where the matter in dispute, exclusive of costs, amounts to the sum or value of $100.

Now, it is not pretended that this is a civil cause of admiralty and maritime jurisdiction; and it has already been shown that there is no law of the United States, of impost or otherwise, to warrant the

[1] 1 Stats. at Large, 76.

seizure of the teas in question, or to subject them to forfeiture. But, even if there were such a law, the only proceeding which could have been instituted under it, must have been to forfeit the articles seized, and not to subject them to the payment of duties. If the case be not one of forfeiture, we can perceive no ground upon which the district court could entertain a suit, by way of libel, to enforce the payment of duties. No jurisdiction is conferred upon that court in such a case, either by the above section of the Judiciary Act, or by any other act of congress. There is no doubt but that a suit at common law might be instituted in that court, as well as in the circuit court, in the name of the United States, founded upon their legal right to recover the possession of goods upon which they have a lien for duties, or damages for the illegal taking or detaining of the same. But the remedy which has been selected is not one which can obtain the sanction of this court.

The decree of the circuit court, reversing that of the district court, and awarding restitution to the claimants, must be affirmed.

POTTER, Appellant, *v.* GARDNER and others, Respondents.

12 W. 498.

A devise of a tract of land to A., "he paying all my debts," charges the debts on the land, and gives the other devisees and legatees a right to maintain a bill to have the debts paid thereout. The creditors need not be made parties.

A purchaser from the devisee may be charged for the purchase-money remaining in his hands, and for what he has aided the devisee in misapplying.

THIS cause was argued by the *Attorney-General* and *Potter*, for the appellant, and by *Webster* and *D. B. Ogden*, for the respondents.

[* 499] * MARSHALL, C. J., delivered the opinion of the court.

This is an appeal from a decree of the court of the United States for the first circuit in the district of Rhode Island. The case was this.

On the 7th of July, 1817, Peleg Gardner made his last will, in which among other things he devised as follows: "I give and devise to my beloved son, Ezekiel W. Gardner, two third parts of all that my ferry farm, so called," &c., "to him the said Ezekiel W. Gardner, and to his heirs and assigns forever, he my said son, Ezekiel W. Gardner, paying all my just debts out of said estate. And I do hereby order, and it is my will, that my son Ezekiel W. Gardner shall pay all my just debts out of the estate herein given to him as aforesaid." The testator gives to his wife, the plaintiff, Hannah, a part of his real and personal estate for life, in lieu of dower, and to

his daughter, the other plaintiff, other parts of his real and personal estate.

Peleg Gardner died soon after the making of his will, and his several devisees entered into the estates devised to them respectively.

On the 13th of July, 1818, the court of probates for the
[*500] *county, in pursuance of a statute made for that purpose, appointed commissioners to receive and examine the claims of the creditors, who made a report on the 10th day of July, 1820, from which it appears that the debts proved against the estate and allowed amount to $7,593.14, exclusive of a claim of $1,000 exhibited by one Mann, which was disallowed, and for which a suit has been commenced against the executrix.

The testator had devised the remaining third part of his ferry estate to his daughter Isabel, who had sold and conveyed the same to her brother Ezekiel. After which Ezekiel agreed to sell the whole estate to the appellant, Elisha R. Potter, for the amount of $15,000.

This bill is filed by the executrix and devisees of Peleg Gardner, to subject the purchase-money of the ferry estate to the payment of the testator's debts. The decree of the circuit court was in favor of the plaintiffs below; and from that decree Elisha R. Potter has appealed to this court.

The bill contains many charges of fraudulent combination between Ezekiel W. Gardner and Elisha R. Potter, which it would be waste of time to review in detail, because they are not sustained, and because the case rests on principles of equity which are believed to be well settled.

The first objection made to the decree is, that the plaintiffs have no right to ask the aid of a court of equity, because they cannot assert the claims of the creditors who could have proceeded at law against the estate in the hands of Ezekiel, and may now proceed at law against the remaining estate of Peleg. That the plaintiffs can give no discharge which will extinguish the rights of the creditors, and that the creditors ought, for that reason, to have been made parties to the suit.

The bill states, and so is the fact, that the whole estate of Peleg Gardner, both real and personal, was disposed of by his will; and, as the ferry estate devised to Ezekiel was the fund provided for the payment of his debts, his devisees and legatees took immediate possession of the property bequeathed to them respectively, and nothing remains in the hands of the executrix wherewith to satisfy
[*501] the creditors. The *bill also states that Ezekiel W. Gardner is insolvent, or in very doubtful circumstances; that a considerable part of the purchase-money has been applied to

the payment of his own debts, and that the plaintiffs have cause to fear that the residue will be misapplied in the like manner, so that the whole trust fund will be wasted, and the property bequeathed to them be taken by the creditors. These allegations are not controverted, and make, we think, a very clear case for an application to a court of equity. It is true that the creditors might have been made parties defendants, but we do not think them parties who may not be dispensed with. So much of the fund as yet remains may be brought into court, and may be distributed according to the rights of those who may apply for it. We have, then, no doubt of the jurisdiction of the court.

We have as little doubt of the liability of the ferry estate while in the hands of Ezekiel, to the creditors of the testator. The words of the will create an express charge. "I give and devise to my beloved son, Ezekiel W. Gardner, and his heirs, forever, two thirds of my ferry farm, he paying all my just debts out of said estate." More explicit words could not have been used. It is admitted by the counsel for the appellant, that these words would charge the estate in a country where the law did not previously charge it; but since, in Rhode Island, lands are liable, by law, to the debts of the testator, the will superadds nothing to this legal charge.

It may be admitted that, as between the devisee and the creditor, no charge is superadded by the will; but the relation of the devisees to each other is materially affected by it. A testator cannot by his will withdraw from his creditors any property which the law subjects to their claims, but he may provide a particular fund for his debts, and if the creditors resort to a different fund, those to whom the property so taken by them was given, are entitled to compensation out of the fund provided for debts. Examples of this principle abound in the books. Personal property is universally liable for debts. If the particular fund provided by the testator for that object be of that description, and a specific thing, bequeathed to another, be taken in execution *by a creditor, it has never [*502] been doubted that the legatee whose property has been taken may resort to the trust fund for compensation. The principle is too well settled to be now a subject for discussion. The law of Rhode Island, then, subjecting lands to the payment of debts, can have no influence on the case before the court. The ferry estate, had it remained in the possession of the devisees, would not only have been liable to the creditors, but would have been liable to the other devisees and legatees, for such portions of their property as had been applied in payment of the debts of the testator.

What change has been made by the sale to Elisha R. Potter?

Although this question has been argued with great earnestness, and at considerable length, scarcely any real difference exists between the parties. The appellees seem to yield to the authority of those modern decisions which deny the distinction between lands charged in the hands of an heir or devisee, with the payment of debts, and lands devised to a trustee for the payment of debts. They admit that, in either case, the purchaser who pays the purchase-money to the person authorized to sell, is not bound to look to its application. But they contend that if the purchase-money be misapplied with the cooperation of the purchaser, he remains liable to the creditors for the sum so misapplied. The counsel for the appellants assent to this proposition. It is scarcely necessary to say that so much of the purchase-money as remained unpaid when this suit was instituted, is liable to the creditors, and is applicable by the court to the purposes of the trust. What, then, is really in dispute between the parties? Nothing but the questions how much of the purchase-money remains unpaid, and how much of it has been applied to the debts of Ezekiel, with the cooperation of Mr. Potter.

The whole purchase made by Mr. Potter amounted to $15,800, of which $15,000 were given for the ferry estate, and $800 for a lot in Jamestown, purchased by Ezekiel from his sister Isabel. One third of the ferry estate had also been purchased by Ezekiel from Isabel, so that $5,800 of the whole purchase-money, was given [* 503] * for property not charged by the will of Peleg Gardner, with his debts, and the remaining $10,000 for property which was so charged. That sum constituted the trust fund.

In the arrangement between the parties, Mr. Potter retained $3,500 for a debt due to himself, and paid debts due from Ezekiel, to the amount, as stated in the answers, of $1,830, making, in the whole, $5,330. On a subsequent agreement between the parties, Potter paid a debt of Ezekiel, amounting to $800; so that Potter has himself paid the debts of Ezekiel to the amount of $6,330, being $330 out of the trust fund. His cash payments, at that time, are stated at $318.66.

In June, 1820, the parties came to a settlement, when a balance of $7,729.62 was found to be in the hands of Potter, for which, he says, he gave his note, payable to order, in good mortgages in South Kingston, or in the State of New York, and a negotiable cash note, payable to the defendant's order, for $4,000, on the 25th of March, 1822.

The cash payments stated by the defendants, amount to $4,318.64. The residue of the purchase-money has either been applied by Potter himself to the payment of Ezekiel's debts, or is comprehended in the

note payable in mortgages, or remains in his hands unaccounted for. In either case, it is liable, so far as it exceeds the sum of $5,800, which is not charged by the will, to the creditors of Peleg Gardner. This court does not enter into minute calculations to ascertain the precise sum due. An account, if it be found necessary, comprehending the necessary calculations of interest, may be taken in the circuit court. The note payable in mortgages is not alleged to be paid, and, not being negotiable, would pass to an assignee, subject to the equity which was attached to it when in the hands of Ezekiel W. Gardner.

The defendant, Elisha R. Potter, has been stated to be liable for the debts of Peleg Gardner, for so much of the purchase-money of the trust estate as remains in his hands. So far he is liable, directly and immediately, and is properly *decreed to pay [*504] the money into court. But, so far as he has applied the money to the debts of Ezekiel, his responsibility is not, we think, immediate, but depends on the failure of Ezekiel to pay; the decree ought, in the first instance, to be against Ezekiel, and, if the money cannot be obtained from him, then against Elisha R. Potter.

No doubt exists of the right of any of the parties to contest the claim of any creditor. The report of the commissioners may be *primâ facie*, but is not conclusive evidence of the claim. The creditor may ascertain his debt by a suit in the state court, or the executrix may contest it in the court of the United States. If Elisha R. Potter or Ezekiel W. Gardner, suppose the executrix to be unfaithful to her duty in this respect, the court will permit either of them to use her name in opposition to the claim.

We are of opinion that so much of the decree as may subject Elisha R. Potter to the debts of Peleg Gardner, beyond the purchase-money remaining in his hands, and beyond the money paid by him in discharge of the debts of Ezekiel W. Gardner, after deducting therefrom the amount of the estates purchased by the said Ezekiel from his sister Isabel, ought to be reversed, and that, in all other things, it ought to be affirmed.

5 P. 718; 10 P. 177.

The United States *v.* Nicholl.

12 W. 505.

The act of May 15, 1820, (3 Stats. at Large 592,) does not discharge sureties on their existing bonds, though it requires new sureties to be given.

The taking of collateral security without suspending the original cause of action does not discharge a surety.

THIS cause was argued by The *Attorney-General* and *Sampson*, for the plaintiffs, and by *D. B. Ogden*, for the defendant.

TRIMBLE, J., delivered the opinion of the court.

[* 506] * The questions to be decided in this case arise out of a bill of exceptions, taken by the plaintiffs, to the charge and instructions of the circuit court to the jury upon the trial of the cause.[1]

The suit was founded on the official bond of Robert Swartwout, as navy agent, and with whom the defendant had become bound as one of his sureties. The bond bears date the 22d day of February, 1819; and is in the penalty of $20,000, with the usual condition, to be void if Swartwout should faithfully perform the duties of his office, and account for and pay over, when required, the public property and money placed in his hands.

The declaration alleges, as a breach of the condition of the bond, that Swartwout's accounts had been settled by the proper accounting officers, on the day of ; and that, upon that settlement, a large balance had been found against him, which he had failed and refused to pay over to the United States when required. The pleadings having been made up, according to the practice of New York, so as to put in issue the matters in controversy between the parties, the plaintiffs gave in evidence to the jury the bond, with its condition, and Swartwout's settled account, duly certified from the treasury department; and the defendant gave in evidence a letter from the secretary of the navy to Robert Swartwout, dated the 25th day of February, 1819; two commissions to Swartwout as navy agent, the one dated the 16th day of October, 1818, and the other the 30th day of November, 1818, and the following letter, dated the 8th day of December, 1823, from Mr. Pleasanton, agent of the treasury, to Mr. Tillotson, the district attorney, which will be more particularly noticed hereafter.

"*Treasury Department, Fifth Auditor's Office, December* 8, 1823.

"Sir: From the best information I can obtain, it seems pretty certain that if we foreclose the mortgage given to the United

[* 507] States by General Robert Swartwout, and expose * the property to sale, subject to a previous mortgage given to Mr. Coster, we shall lose the whole or nearly all of our debt, this property being our only reliance, if the sureties should be discharged by due course of law from their responsibility for the payment of it. Under these circumstances, the only alternative which presents itself

[1] This cause was tried in the court below by the late district Judge Van Ness.

for securing any considerable portion of the debt is, to allow General Swartwout time within which to make an advantageous disposition of the property. He expresses a confident belief that in seven years he would be enabled, by connecting it with a banking institution, for which a charter has already been granted by the State of New Jersey, not only to pay off the first mortgage, but our mortgage also.

"It has been recommended by the Navy Department to allow this time; and I have, accordingly, instead of three years, as intimated to you some time ago, determined to allow him seven years, provided the first mortgagee will pledge himself in writing not to molest him for the same space of time; and provided also, that the bank with which the property is to be connected, shall go into operation on or before the first of October next. Should the banking capital not be made up by the time mentioned, and the bank fail to go into operation, this agreement is to be considered wholly null and void. You will be pleased to take such steps as will give this arrangement effect.

"As the sureties on General Swartwout's bond dispute our right to recover the penalty from them, it will be your duty forthwith to institute suits against them in the circuit court, and judgment going against us there, you will remove the cause to the supreme court, it being very desirable that the law should be settled in relation to bonds so situated.

"I have the honor, &c.,
(Signed) S. PLEASANTON,
Agent of the Treasury."

The circuit court decided, and accordingly instructed the jury, first, "that the defendant, Francis H. Nicholl, was not responsible for any defalcation that took place on the part of Robert Swartwout as navy agent, subsequent to the *30th day of [* 508] September, 1820, when, in and by the act of congress, passed the 15th of May, 1820, new sureties were required by law to be given by the said Robert Swartwout.

Secondly, "that the defendant was not responsible for any deficiency of public money reported on by the account-officers of the United States, subsequent to the 30th of November, 1822, when it appeared in evidence that the appointment of Robert Swartwout, as navy agent, expired by its legal termination.

Thirdly, "that he left it to them to decide whether the letter from S. Pleasanton, Esq., addressed to Robert Tillotson, Esq., which had been read in evidence before the jury, did give further time to Robert Swartwout for the payment of the debt due the United

States; and that, if, in the opinion of the jury, the letter in question did give time to the said Robert Swartwout, until October, 1824, or any subsequent period, that then the defendant was discharged from his liability, and their verdict should be rendered for the defendant. And lastly that the said several matters so produced and read in evidence, on the part of the said Francis H. Nicholl, were sufficient, in law, to maintain the issue on his part, and that the United States ought not, upon all the matters produced in evidence, to maintain the said action," &c.

These several opinions and instructions are brought before this court for reëxamination by the present writ of error.

Upon looking into the act of congress, passed May 15, 1820, entitled "An act providing for the better organization of the treasury department," which is the one referred to in the first instruction, we are satisfied it was misconstrued by the judge. The second section of the act provides a new and summary process against public defaulters and their sureties, after the 30th of September, 1820. The scope and design of the act, in requiring new sureties to be given by that day, was in order that, if such new sureties should be given, the summary process might operate upon them as well as upon the principal, if the treasury department should elect to pursue such summary process. This is manifest from the provision in the act, that the summary process shall not affect the existing sureties.

[* 509] * The act nowhere directs the principals to be discharged from office, upon failure to give new sureties; and if the act had so directed, they would have remained in office until actually removed. The law does not, in terms, declare the existing sureties shall be discharged from and after the 30th of September, 1820. It would require a very strained construction of the statute to discharge them by implication, while their principals were permitted to remain in office. Such construction would be, we think, against the manifest intention of the legislature. The 9th section enacts "that nothing in this act contained shall be construed to take away or impair any right or remedy which the United States now have, by law, for the recovery of taxes, debts, or demands."

The cases of the United States *v.* Kirkpatrick, 9 W. 720, and the United States *v.* Vanzandt, 11 Ib. 184, are, in principle, undistinguishable from this case.

They decide 1. That laches is not imputable to the government. 2. That the provisions of the law requiring settlements by its officers to be made at short periods, are designed for the security and protection of the government, and to regulate the conduct of those

officers; that they are merely directory to those officers, and form no part of the contract with the sureties. And the last case decides, 3. That where the act expressly directs a defaulting officer to be recalled at the expiration of six months from the time of his default, his sureties are not discharged, but remain liable for his defaults thereafter, until he is actually recalled.

If the second instruction given to the jury was intended to inform them that the defendant, as surety of Swartwout, was not legally responsible for money placed by the government in his hands, after the legal termination of his office, it was unquestionably correct; and this is the sense in which we suppose the court meant to be understood. But if it was intended to convey the idea that he was not responsible for money which came to Swartwout's hands while in office, but which he afterwards failed to account for and pay over, it was clearly incorrect.

*In deciding upon the third instruction given, as to the [*510] effect and operation of Mr. Pleasanton's letter to the district attorney, it is not intended to give any intimation of what would be the opinion of this court, if it had appeared from the letter, that the government had made any arrangement with Swartwout, without the assent of his sureties, whereby the right of the government to sue upon the bond had been suspended to the first day of October, 1824, or to any subsequent time. Nothing of the kind appears from the letter. It speaks of a mortgage which had been given by Swartwout, upon property subject to a former mortgage to Mr. Coster; but it does not appear that, by the terms of the mortgage, the right to sue on the official bond was suspended; and the taking of a collateral security, without suspending the right to sue on the bond, could not bar the action on the bond. The letter speaks of an intention formed of giving time upon the mortgage, upon specified conditions and contingencies; but none of those conditions or contingencies are shown to have been complied with, or to have happened. The letter contains no contract, and gives no time *per se*, upon any consideration binding on the government; and that the letter did not intend to suspend the right of the United States to sue on this bond, is palpable, because it directs suit to be brought thereon immediately. As no fact connected with the letter was proved by evidence *aliunde*, the construction of the letter upon its face was matter of law, and the circuit court ought to have decided and instructed the jury accordingly, that nothing on the face of the letter constituted any defence to the action. There was nothing but the construction of the letter to be left to the jury, and the court ought to have informed the jury that, according to its true

construction, it did not give time so as to bar the action against the surety.

After the observations already made, it cannot be necessary to go into any further reasoning to show that the circuit court erred in its concluding instruction, that, upon the whole matter, the law was for the defendant. It was a conclusion drawn by that court, from the premises it had assumed in the former instruction given,

[* 511] and the error of these premises *having been shown, the error of the conclusion necessarily follows.

Some observations were made by the defendant's counsel, in argument, as to the manner in which the debits and credits in Swartwout's account had been adjusted by the accounting officers; and he seemed to suppose that credits which ought to have been applied towards the extinguishment or lessening of the debits, for money placed in his hands before the 20th of November, 1822, had been improperly applied to the transactions of Swartwout with the government after that day.

The case of The United States *v.* January and Patterson, 7 C. 572, is in point to show that, as to any disbursements of money after the 30th of November, 1822, for which Swartwout was entitled to credit, it was at the election of the government to apply them to either account. But there is no necessity for the application of the principle to this case; for, upon looking into the account, we find that, after crediting Swartwout with all his disbursements up until the 30th of November, 1822, there remained on that day a balance in his hands unaccounted for, much beyond the penalty of the bond; so that no injustice is done to the surety in the manner of settling the account.

Judgment reversed, and a *venire facias de novo* awarded.

15 P. 187.

M'GILL, and others, Plaintiffs in Error, *v.* THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE UNITED STATES, Defendants in Error.

12 W. 511.

A resolution to suspend a cashier does not remove him from office; and for any defaults by him after the resolution, and before he is actually removed, his sureties are responsible.

Sureties are discharged from a judgment for the penalty of their bond only on payment of the principal equitably due, and interest and costs.

THIS cause was argued by *D. B. Ogden*, for the plaintiff in error, and by *Webster*, for the defendants in error.

JOHNSON, J., delivered the opinion of the court.

This cause comes up by writ of error from the circuit court of the United States, held for the district of Connecticut, in which the defendants here obtained a judgment against the plaintiffs, upon a penal bond, in which M'Gill was principal, the other defendants sureties.

M'Gill was cashier of one of the branches of the Bank of the United States, and this bond was given in the penal sum of $50,000, conditioned for the due performance of that office.

The replication sets out a great variety of breaches, and the cause was decided below upon a special verdict, by which was found for the plaintiffs the sum of $66,548, consisting of a variety of items, upon which interest is * charged severally, from the [* 513] date of the embezzlement or other breach to the time of finding the verdict.

The verdict then finds two payments, one of $20,000, made by one of the sureties, on the 16th of December, 1820; the other of $500, made by another of the sureties, on the 22d of December, 1820, on which they also calculate interest to the date of the verdict, and, deducting the amount of principal and interest, strike a balance of $43,182.50.

It also finds the following facts: "That the president and directors of the Bank of the United States, on the 27th of October, 1820, at Philadelphia, passed the following resolution, to wit: 'Whereas it appears, by the report of a committee of the office of discount and deposit at Middletown, that Arthur W. M'Gill, cashier of that office, has been guilty of a gross breach of trust, in knowingly suffering overdrafts to be made by individuals; also by making overdrafts himself; therefore, resolved, that A. W. M'Gill, cashier of the office at Middletown, be and he is hereby suspended from office till the further pleasure of the board be known.

"On motion, resolved, that the president of the office at Middletown be authorized and requested to receive into his care, from A. W. M'Gill, the cashier, the cash, bills discounted, books, papers, and other property in said office, and to take such measures for having the duties of cashier discharged as he may deem expedient."

Which resolutions were immediately transmitted by mail to the president of the Middletown office, who received them on the morning of Sunday, the 29th of the month, but did not communicate them to M'Gill until the afternoon of the 30th, between the hours of four and five in the afternoon.

It then finds that all the breaches were incurred before the 30th, and goes on to find alternatively, so as to enable the court to give judgment, according to its views of the law, as between the parties. There appear to have been various questions argued in the court

below, some of which were decided for the plaintiff, some
[* 514] for the defendant; but * as the plaintiff below seeks an affirmance of the judgment, and has not sued out a writ of error, it follows that we confine ourselves to those points only which were decided against the plaintiff here. These were two, one of them going to the whole right to recover, the other to the application of the payments towards the discharge of the sum to be recovered.

The first of these was, whether the sureties were not discharged *ipso facto* from further liability, by the resolution of the parent bank, on the 27th; or if not on that day, then on the 29th, the day on which it was received at Middletown by mail. If discharged on either of those days, it would follow that the plaintiffs below could not have judgment, since the finding was up to the day following.

We are unanimously and decidedly of opinion, that the ground assumed by the defendants below cannot be maintained. What was there in the resolutions of the parent bank to discharge the obligors at all from their liability? The resolution was only to suspend, and this implies the right to restore. The cashier's salary went on, and had the board rescinded their resolution, what necessity would there have existed for a redelivery of his bond?

But there is no necessity for placing the decision on this ground, since, notwithstanding the resolution of the board is expressed in the present tense, a future operation must necessarily be given it, from a cause that could not be overcome, the distance of the parties from each other. Time became indispensable to giving notice, and the day on which the communication reached the president of the Middletown Bank was a day not to be profaned by the business of a bank. There was, then, no obligation to deliver the notice and dispossess the cashier until the 30th, and the law makes no fractions of a day.

The court below, in applying the payments, directed them to be deducted from the penalty of the bond, and then gave interest upon the balance thus resulting. This, with the exception of the interest, was the most favorable application possible for the defendants below; and the interest on the balance having been only allowed from the date of the suit, and the sum thus ascertained falling short
[* 515] of the penalty of the bond, * we think the defendant below has nothing to complain of. It will be discovered, by reference to dates, that the payments here made preceded the institution of the suit, and, although made by the sureties, they were made severally, for any thing that appears to the contrary from the verdict. Technically, then, the judgment to be entered would have been a judgment for the penalty of the bond, and, in applying the partial

payment, the court would have been governed by those principles which have been transferred in practice from the courts of equity to the courts of law, in deciding on what terms a party shall be released from the penalty of his bond. These always are, on payment of principal, interest, and costs. And it can constitute no objection to the application of this principle to the case of these obligors, that no interest was allowed them during the short interval between the payment and the suing out of the writ, since the breaches were incurred long before, and interest for the same period is refused to the bank.

Judgment affirmed, with six per cent. interest.

12 H. 159.

RICHARD DRUMMOND, surviving partner of CHARLES DRUMMOND, *v.* The Executors of GEORGE PRESTMAN.

12 W. 515.

A judgment recovered on an account against the principal, is evidence of the amount due from him, in an action against a guarantor of the account.

*THIS cause was argued by the *Attorney-General* and [*516] *Meredith*, for the plaintiff, and by *Taney* and *Donaldson*, for the defendant.

JOHNSON, J., delivered the opinion of the court.

This case arises on the following state of facts: Richard and Charles Drummond, being engaged in some joint mercantile adventures, which appear to have been carried on chiefly by Charles, made consignments, in the year 1803, to William Prestman, then doing business as a commission merchant in Baltimore. George Prestman, the father of William, thereupon addressed to Charles Drummond a letter of guaranty, in these terms: —

"Baltimore, 17th November, 1803.

"CAPTAIN CHARLES DRUMMOND: —

"Dear Sir: My son William having mentioned to me that, in consequence of your esteem and friendship for him, you have caused and placed property of yours and your brother's in his hands for sale, and that it is probable, from time to time, you may have considerable transactions together, on my part I think proper, by this, to guarantee to you the conduct of my son, and shall hold myself liable, and do hold myself liable, for the faithful discharge of all his engagements to you, both now and in future."

*The connection in business was kept up between the [*517] Drummonds and William Prestman, until Charles's death,

after which Richard, who resided in Norfolk, came up to Baltimore, to adjust the accounts of the concern with William, and then received from him an account, stated as between him and Charles Drummond, on which, after some corrections, which appear on the face of the account, the balance is struck, for which this suit is instituted.

This account commences with an acknowledgment of a balance due the Drummonds, in November, 1804, and brings down their transactions to December 20, 1805.

Upon this account, a suit was instituted against William Prestman, in 1806, in the name of Richard, survivor of Richard and Charles Drummond, and a judgment confessed. William Prestman was dead at the time of the trial of this cause.

This suit is now instituted upon the letter of guaranty; and the declaration, after setting out the letter and the subsequent transactions with William, demands the sum acknowledged due upon the account stated.

Upon the trial, the plaintiff gave in evidence the letter of guaranty, the account stated by William, parol evidence of subsequent acknowledgments of its correctness, and the record of recovery upon that account, in which he confesses judgment to Richard, as survivor of Richard and Charles Drummond, also parol evidence conducing to prove the joint dealings of the Drummonds.

In the progress of the trial, the defendants took exception to the admission in evidence of the record of recovery against William. The court overruled the exception, and it went to the jury; but the court refused to grant a prayer of the plaintiff, that they would instruct the jury that, upon the whole evidence, he was entitled to a verdict; and to this refusal the bill of exceptions is taken, upon which the principal question in this cause arises.

As evidence was permitted to go to the jury, conducing to prove as well the copartnership between Richard and Charles Drummond, as the balance due by William Prestman, and the interest of Richard in that balance, it follows that the refusal of the court to [* 518] give that instruction could *only have been upon the ground that the guaranty did not cover this demand; and this, accordingly, has been the principal question made in argument.

It is contended that the correct construction of this guaranty will exclude a copartnership debt; that, in its language and import, it is confined to liabilities to be incurred by William to Charles or Richard severally, or to Charles individually, and cannot be extended to a copartnership interest under a trade ostensibly carried on as between Charles solely and William.

We have considered this question attentively, and are unanimous

in the opinion that the guaranty may well be construed to cover the joint trade of Charles and Richard. An interest of Richard is expressly contemplated by the guaranty, and the language of the letter seems more naturally adapted to a joint than a several interest. For, a concern being represented in the person of any one of its members, the use of the pronoun of the second person is naturally suggested and familiarly resorted to when we address ourselves to an individual of the concern. This court is not called upon to decide whether the words might not also be correctly applied to an individual interest as well as a joint concern. It is enough, for the purposes of this action, if they will cover the latter.

It is a rule, in expounding instruments of this character, "that the words of the guaranty are to be taken as strongly against him as the sense will admit." But it is not necessary to test this letter by any canon of the law of guaranty more rigid than the first and most general, to wit, "that no party shall be bound beyond the extent of the engagement which shall appear from the expression of the guaranty and the nature of the transaction." There is nothing on the face of the letter which holds out the idea of a connection between William and the Drummonds, exclusively in their individual capacity. The object is to throw business into the hands of the guarantee's son, and it could not have been inconsistent with this idea to guarantee a joint trade as well as an individual trade. The grammatical construction of the language will sanction this idea, and the nature and object of the guaranty favors it. If it be * conceded [* 519] that there is a latent ambiguity on the face of the instrument, that ambiguity might well be explained by the objects of the instrument and the circumstances attending its origin. We are therefore of opinion that the court erred in refusing the instruction as prayed, and for that reason the judgment must be reversed, and a *venire facias de novo* awarded.

But, as is the practice of this court, where questions present themselves on the record, and are argued, upon which the same cause may possibly be brought back here, the court has also considered the question whether the record of the judgment between this plaintiff and William was properly admitted in evidence.

On this subject it is necessary to observe that it was not set up as a plea in bar, nor as a decision conclusive of the right of the party to recover in this action. There was evidence in the cause to establish the defendant's guaranty, and the balance acknowledged by William; also, evidence conducing to prove the joint trade carried on by Charles and Richard Drummond, through the hands of Charles, with William. This record was certainly competent to prove a fact which

every judgment is competent to prove between any parties, to wit, that such a judgment was obtained between certain parties in a certain cause of action. It was also evidence to prove that the cause of action was identically the same with the one on which this action was instituted; and that, in that suit, William Prestman solemnly acknowledges that the statement made by him in favor of Charles Drummond was of a debt really due on a joint trade between Charles and Richard Drummond. And why should not this be evidence against George, the guarantee, who had tendered himself as security to these individuals in these very transactions?

We are perfectly aware of the rule that he who cannot profit by a judgment between other parties should not be damnified by it. But here the application of the rule is in favor of the admission of this record. Suppose the suit against William Prestman had gone to a jury, and a verdict obtained against this plaintiff, can there [* 520] be a doubt * that the record would have been admissible in evidence in favor of this defendant?

The material fact on this subject is, that the liability of the guarantee is dependent upon the liability of the principal; the case, therefore, is not widely different from that of accessory and principal, in which the record of the conviction of the principal is *primâ facie* evidence against the accessory.

Nor is it unlike the case of Green *v.* The New River Company, 4 Term Rep. 590, in which it was held that a judgment against a master for damage from the negligence of his servant, was good evidence against the servant, in an action against him by the master for the same negligence, the recovery in the one case being dependent upon that in the other. See, also, Stark Ev. 188, 189. There the case is presented of a master suing the servant for damage sustained by the negligence of the servant. The questions are, whether the master has been damnified by the negligence of the servant, and to what amount; and the record of a judgment against the master is admitted in evidence against the servant. The present case, however, is a much stronger one. It seems unique in its principle, since the object of introducing the record seems not so much to prove that a judgment was obtained, as that a judgment was confessed. Now, the proof of William Prestman's liability to Drummond was indispensable to Drummond's recovery against the guarantee. But this liability might have been proved by a confession in writing, or even by parol, after his death, if not before; then why not by the more solemn act of confessing it of record?

It is worthy of remark in this case, that the guaranty purports, by its terms, to be something more than a mere suretyship for a debt

The words are, I guarantee to you "the conduct of my son." It partakes, therefore, of the nature of a bond given by a surety for the faithful discharge of a duty; and it cannot be doubted that, in proving the fact of a breach of the condition of such a bond, the confessions of the principal, after his death, would be evidence. It would be difficult to assign a reason why his confessions
*should lose that character by increasing in their solemnity. [*521]

We are aware that there are cases which have been thought to maintain principles inconsistent with these doctrines. They are chiefly collected together in the 2d vol. of Mr. Metcalf's edition of Starkie's Treatise on Evidence, title Surety.

We have examined those cases, and find some of them of very little authority, others inapplicable to the circumstances of the present case, and, generally, in support of our opinion.

The case of Dawes *et al. v.* Shed *et al.* executors, 15 Mass. 6, has no application. It was a suit against the surety of an executor, by a creditor of the deceased, who had obtained judgment against the executor, and received payments of interest upon the debt. The question was, whether this precluded the surety from his plea of the act of limitations of that State, made in favor of executors. The court decided that it did not preclude him. In that case, the record was pleaded in bar, and the decision given that it was not conclusive.

In the case of Respublica *v.* Davis, 3 Yeates, 128, an attempt appears to have been made to introduce a record for the purpose of proving an admission of counsel in evidence; we cannot understand on what principle it was rejected; but the suit being on a recognizance that one Cobbett should keep the peace, and the breach proposed to be established being the publication of a libel, parol evidence of the confession of Cobbett was admitted to prove, against the surety, that he had published a libel. So that this authority would seem in favor of our doctrine.

So, in The Sheriffs of London *v.* Tindall, 1 Esp. Cases, 394, which was a suit against the surety of a bailiff, a receipt indorsed on a warrant, in the handwriting of the principal, was admitted in evidence, which amounted to nothing less than a confession that the bailiff had received a sum of money, and ordered the prisoner discharged. It was objected that the bailiff himself should be sworn, but the judge refused, and admitted the evidence, declaring
that the bailiff *was, in fact, the defendant in the action. [*522]
This would go far to prove, that even in William Prestman's
life, the stated account would have been evidence against George;

and the fact of a judgment being entered upon it by confession, could not have been immaterial to corroborate it.

The case of Evans *et al.* v. Beatie, executors, 5 Esp. Cas. 26, seems *contrà;* for there, in a suit against the guarantee of one Copper, for "any woollens that should be furnished him by plaintiff," evidence was offered to prove Copper's parol acknowledgment of certain goods delivered, but refused on the ground that he might be sworn, and it was not the best evidence the nature of the case would admit of.

Here, it will be observed that the principal was living; but we must not be thought to concur, without further consideration, in the doctrine that he could have been equally sworn for the one party, or compelled to give evidence for the other. With the surety he had a direct interest, and against the plaintiff it was equally direct. In the present case the principal was dead, This case is loosely reported, and attributes some observations to Lord Ellenborough which we doubt much the authenticity of.

In the case of Higham v. Ridgway, 10 East. 122, the doctrine on these subjects is laid down with so much good sense as to speak its own correctness. It is to this effect; that the principle to be drawn from all the cases is, that if a person have peculiar means of knowing a fact, and make a declaration of that fact which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his lifetime. On this principle it is that entries in receivers' accounts are admitted; so, also, an acknowledgment by a witness of a debt to another, or of an acquittance of a debt to himself; because the individual who makes the acknowledgment has no interest of his own to subserve, but does it to his own prejudice. In all such cases, however, the evidence is received with due caution, and its weight must rest with the jury.

The most stubborn case on this subject that we have considered is that of Beall v. Beck, reported in 3 Harris & M'Henry, 242.

[* 523] * This was debt upon a sheriff's bond, brought against a surety in Maryland. The same plaintiff had brought suit, and recovered judgment against the sheriff for the same cause of action, and the court refused to receive the record of that judgment in evidence as against the surety. In the inferior court it was rejected on a division of opinion, but in the court of the last resort, we are told, the judgment was affirmed.

On this decision we can only remark that the report of it is very brief and unsatisfactory; there is no argument of counsel, or other means of determining on what the decision turned. If the attempt was made to introduce the record as final and conclusive against the surety, it was properly rejected, and, in the absence of any thing to

prove the contrary, we cannot but suspect that such was the true import of that decision. In any other view we should not feel satisfied to recognize its authority.

Judgment reversed, and a *venire facias de novo* awarded.

HARCOURT and others *v.* GAILLARD and others.

12 W. 523.

A grant made by the British governor of Florida, after the declaration of independence, within the territory lying between the Mississippi and the Chatahouchee Rivers, and between the 31st degree of north latitude, and a line drawn from the mouth of the Yazoo River due east to the Chatahouchee, is invalid as the foundation of title in the courts of the United States.

THIS cause was argued by *White* and *Isaacks*, for the plaintiffs, and by *Coxe* and *Worthington*, for the defendants.

* JOHNSON, J., delivered the opinion of the court. [* 524]

The questions upon which this cause turns arose out of a British grant to the ancestor of the plaintiff, dated the 24th of January, 1777.

The land in controversy is situated in that tract of country which lies between the Mississippi and Chatahouchee Rivers, and between the 31st degree of north latitude to the south, and a line drawn from the mouth of the Yazoo River, due east to the Chatahouchee. From the earliest times of the settlement of North America, the region of territory in which that tract of country is described was the subject of wars and negotiations with France, Spain, and Great Britain, until 1763, when Great Britain became the undisputed proprietor of the whole, from the Lakes Maurepas to Ponchartrain, and the Gulfs of Mexico and Florida, by the Mississippi northwardly. Before that time her claim extended southwardly to the 29th degree of north latitude, as is evidenced by her charter to the lords proprietors of 1677; and from the same instrument it appears that she interfered with the province of Louisiana, by extending her southern line to the Pacific Ocean. The country of Florida, therefore, south of the 29th degree, was a conquest; that north of the 29th degree, and up the Mississippi, was held as a part of her own territory, concerning which her treaties with France and Spain only established a disputed boundary.

On the 7th of October, 1763, the king, exercising a right which was never questioned, over what were then called royal provinces, issued his proclamation, by which he established the northern boundary of the Floridas at the 31st degree of north latitude from the

Mississippi to the Appalachicola, down that stream to its confluence with Flint River, and from that point by a line to the head of the St. Mary's, and by that river to the sea. And this was the line which, by treaty of peace, was established as the southern boundary of the United States. After the peace, the United States, Spain, South Carolina, and Georgia, succeeded to the disputes of Great Britain, France, and Spain, relative to the same tract of country.

[* 525] * The original title of South Carolina, under the grant to the lords proprietors, was unquestionable; and she contended that she had never been legally devested of soil or sovereignty.

Georgia founded her claim on the commissions to her governor, Wright, which comprised within its jurisdiction the territory in question; and the United States claimed it as a conquest from the British province of West Florida; while Spain insisted that it was a part of Louisiana or Florida, and, as such, ceded to her by the treaty of 1783. Finally, South Carolina, by the treaty of Beaufort, relinquished her claim to Georgia, and the United States settled her claim by taking a cession from Georgia of the land in controversy; so that, at present, the claims of the United States, of the State of South Carolina, and of Georgia, have become united in the general government.

The grant to Harcourt, it will be perceived from its date, was subsequent to the declaration of independence, and within the acknowledged limits of the United States; it therefore involves the question whether such a grant can be valid; a question which would have been involved in less difficulty, if the United States had never set up the claim of conquest. That ground would admit the original right of the governor of West Florida to grant, and if so, his right to grant might have continued in force until the treaty of peace; and the grant in that case to Harcourt might have had extended to it the benefit of those principles of public law which are applicable to territories acquired by conquest; whereas, the right set up by South Carolina and Georgia deny all power in the grantor over the soil; the question which they present is one of disputed boundaries, within which, the power that succeeds in war is not obliged to recognize as valid any acts of ownership exercised by his adversary.

There are several reasons for putting the claim of the United States out of the question. She has abandoned it, and it is very clear, could never have sustained it. The very ground on which she denied the capacity of Spain to conquer, or take by cession, the territory on the Mississippi, was fatal to the pretensions set

[* 526] up by her against Georgia and South * Carolina, to wit.

that Spain could not acquire by conquest a territory within the limits claimed by an ally in the war.

But there was another reason. There was no territory within the United States that was claimed in any other right than that of some one of the confederated States; therefore, there could be no acquisition of territory made by the United States distinct from or independent of some one of the States.

We are then referred to the belligerent rights of South Carolina and Georgia; and it is immaterial to the question here, to which of those States the territory appertained. Each declared itself sovereign and independent, according to the limits of its territory, and both extended their claims of territory to the 31st parallel of north latitude. There is no evidence that either, at that time, had acquiesced in the extension of the territory of Florida beyond that line.

The facts upon which the right of the governor of Florida to issue grants beyond the 31st degree of north latitude rested are these: After the proclamation of 1763, the board of trade of Great Britain, which, at that time, had the affairs of the colonies committed to them, passed a resolution, of the date of March, 1764, in which they advise the king to extend the limits of West Florida up to a line drawn from the mouth of the Yazoo, east to the Chatahouchee. It does not appear that the king ever made an order adopting this recommendation. No proclamation was issued in pursuance of it; but it appears that, from that time, the commissions to the governors of West Florida designated that line as the northern limit of that province; notwithstanding which, Governor Wright continued to preside over Georgia, under his commission of 1763, which embraced in its limits the whole of that country, bounded south by the 31st degree of north latitude. Thus stood the rights of the parties at the commencement of the Revolution; and when, by the treaty of peace,[1] the southern boundary of the United States was fixed at the ancient boundary of South Carolina or Georgia, (it matters not which,) Georgia insisted on that line as the limit which she was entitled to, and which she had laid claim to when she declared herself independent; or which the United States had asserted in her behalf in the Declaration of Independence. But as there had been nothing very unequivocal * done at the time of the declaration [*527] of independence, as to designating the limits of the United States, it is still contended that the tract of country in which the grant lies had been legally separated from Georgia before the Revolution, and attached to West Florida; and that, therefore, a grant by the governor of the latter province was valid, if made at any time previous to the treaty of peace.

[1] 8 Stats. at Large, 80.

Two questions here occur, first, whether this separation had taken effect by any valid act; and, secondly, if it had, whether it made any difference in the case upon international principles.

On both these points we are of opinion that the law is against the validity of this grant. It is true that the power of the crown was at that time admitted to be very absolute over the limits of the royal provinces; but there is no reason to believe that it had ever been exercised by any means less solemn and notorious than a public proclamation. And although the instrument by which Georgia claimed an extension of her limits to the northern boundary of that territory, was of no more authority or solemnity than that by which it was supposed to have been taken from her, it was otherwise with South Carolina. Her territory had been extended to that limit by a solemn grant from the crown, to the lords proprietors, from whom, in fact, she had wrested it by a revolution, even before the rights of the proprietors had been bought out by the crown.

But this is not the material fact in the case; it is this, that this limit was claimed and asserted by both of those States in the Declaration of Independence, and the right to it was established by the most solemn of all international acts, the treaty of peace. It has never been admitted by the United States that they acquired any thing by way of cession from Great Britain, by that treaty. It has been viewed only as a recognition of preëxisting rights, and on that principle, the soil and sovereignty within their acknowledged limits were as much theirs at the declaration of independence as at this hour. By reference to the treaty, it will be found that it amounts to a simple recognition of the independence and the limits of the United States, without any language purporting a cession or relin-
[*528] quishment of *right, on the part of Great Britain. In the last article of the treaty of Ghent,[1] will be found a provision respecting grants of land made in the islands then in dispute between the two States, which affords an illustration of this doctrine. By that article, a stipulation is made in favor of grants before the war, but none for those which were made during the war.

And such is unquestionably the law of nations. War is a suit prosecuted by the sword; and where the question to be decided is one of original claim to territory, grants of soil made *flagrante bello* by the party that fails, can only derive validity from treaty stipulations. It is not necessary here to consider the rights of the conqueror in case of actual conquest; since the views previously presented put the acquisition of such rights out of this case.

The remaining question is whether the parties plaintiffs have been established in their rights by any act or treaty of the United States.

[1] 8 Stats. at Large, 218.

The treaty of peace contains no stipulation in their favor. Nor does the treaty with Georgia, since all the reservations there made in favor of British or Spanish grants, and inchoate titles, are expressly confined to the case of actual settlers. But the spontaneous bounty of the United States has gone further, and confirmed a great variety of questionable titles, emanating from British and Spanish authority.

Is this one of the titles embraced within the provisions of the statutes passed upon this subject? It is obvious that it is not.

It is true that the act of the 3d of March, 1803,[1] although making no express provision in favor of British or Spanish grants unaccompanied with possession, does seem to proceed upon the implication that they are valid; recognizing the principle that a change of sovereignty produces no change in individual property, yet it imputes to them only a modified validity, since by the 5th section it imposes a positive necessity upon the proprietors to record such grants, and makes expressly void all the rights claimed under the first three sections of that act, or the Georgia treaty, if the duty so imposed be not complied with. And with regard to all *other [*529] evidences of title not recorded in the time limited, declares that they shall never be admitted in evidence against any grant derived from the United States.

The first section of the Supplementary Act of 27th of March, 1804,[2] extends the time for recording British grants, and vests in the board of commissioners a power of examining and confirming the claims to be filed under its provisions, as extensive as that given by the previous act over the rights claimed under the cession from Georgia, or the first three sections of that act.

But the grant to Harcourt appears neither to have been recorded, nor passed upon by the commissioners; it has, therefore, nothing to claim from the bounty of the United States; and that provision in the 5th section of the act of 1803, which forbids its being received in evidence as against American grants, would certainly have operated against it in any case clearly within the provisions of that act. Here, it is contended that the court anticipated the question and rejected the grant, before it was possible that the question could arise, whether the same land had passed under an American grant.

On this subject it must be observed that neither of the acts of 1803 or 1804 contains an express recognition of the validity of any British grants beside those which were accompanied with possession; and, for that reason, coming within the Georgia treaty, and those which should be confirmed by the commissioners under the first sec-

[1] 2 Stats. at Large, 229. [2] Ib. 303.

tion of the act of 1804, with regard to which there seems to be a very general power given to that board. All others must rest upon their validity according to the principles of the modern law of nations. Upon these principles it has been shown that the grant to Harcourt was invalid, and, if so, it was not admissible as evidence to sustain the plaintiff's action under any circumstances. The rule, therefore, applies to this case that a plaintiff must recover by the strength of his own title, not the weakness of his adversary's; for which reason, we think the grant was properly rejected, and that the judgment below must be affirmed, with costs.

6 P. 691; 12 P. 410, 657; 14 P. 353; 19 H. 393.

HENDERSON, Plaintiff in Error, *v.* POINDEXTER'S LESSEE, Defendant in Error.

12 W. 530.

Spanish grants made after the treaty of peace of 1782, between the United States and Great Britain, within the territory east of the River Mississippi, and north of a line drawn from that river, at the 31st degree of north latitude, east to the middle of the River Appalachicola, have no intrinsic validity, and the holders must depend for their titles exclusively on the laws of the United States.

No Spanish grant, made while the country was wrongfully occupied by Spain, can be valid, unless it was confirmed by the compact between the United States and the State of Georgia, of the 24th of April, 1802, or has been laid before the board of commissioners constituted by the act of congress of the 3d of March, 1803, (2 Stats. at Large, 229,) and of March 27, 1804, (2 Stats. at Large, 303.)

THIS cause was argued by *Webster* and *Coxe*, for the plaintiff in error, and by *Ogden*, for the defendant in error

MARSHALL, C. J., delivered the opinion of the court.

This is a writ of error to a judgment rendered in the court of the United States for the district of Mississippi, in an ejectment brought by the defendant in error.

George Poindexter, the lessor of the plaintiff, claimed title to the premises in controversy, by virtue of several patents regularly issued to him under the laws of the United States. If the lands were, at the time, grantable, his title is unquestionable. Consequently, the case depended, in the district court, on the title of the defendant in that court. Under several opinions given by the judge to the jury, to which bills of exceptions were taken, a verdict was found

[*531] *for the plaintiff in ejectment, the judgment on which has been brought before this court. The case must depend on the correctness of the opinions given by the district judge; but, as those opinions bring the title of the defendant in ejectment before this court, the case will be best understood by taking a general view of the principles on which that title stands.

The defendant gave in evidence a grant from the government of Spain for 1,000 acres of land, bearing date on the 20th of June, 1795, with a plat and certificate of survey annexed; under which grant he claimed so much of the land in controversy as it covered. He also offered in evidence a duly certified copy of a certificate of survey and patent issued thereon to David Pannell, for 500 acres, the residue of the premises in controversy; the certificate by the Spanish surveyor-general, Carlos Trudeau, dated the 25th of March, 1795, and the patent issued December 7, 1797, by Manuel Gayoso, the Spanish governor of West Florida, with a deed of release and confirmation from David Pannell to him, dated January 19, 1820. It was admitted that the originals of the plat and certificate of survey, and of the patent thereon, of which copies were offered, were not in his possession, nor under his control. These papers were rejected, and a bill of exceptions was taken to the opinion rejecting them.

The defendant also read the deposition of Tessias, to prove the fairness of the grants under which he claimed, and that they were regularly issued by the proper officers of the Spanish government, at the time they bear date respectively. To rebut this testimony, the plaintiff in ejectment produced a letter of instructions found among the papers of William Atcheson, deceased, the deputy surveyor, by whom the lands in controversy were surveyed. This letter was directed to William Atcheson, and was proved to be in the handwriting of William Dunbar, who is also dead, and who was proved to be the principal surveyor of the district of Natchez, under whom Atcheson acted. The signature appears to have been torn off. This paper tended to show that the surveys and grant were not made at the time they bear date, but afterwards. The defendant objected *to its admission, but his objection was overruled, [*532] and to this opinion, also, he took an exception.

The defendant prayed the court to instruct the jury —

1. If they should find that, at the time of the sale by the United States, of the premises in question, the defendant was in full possession thereof, under an adverse title or color of title, such sale was void, and passed no title on which the plaintiff could recover.

2. If they should find that the defendant, and those under whom he claimed, had the uninterrupted and quiet adverse possession of the premises, claiming under a Spanish title legally and fully executed, prior to October 27, 1795, under which the possession was originally taken, that the plaintiff cannot recover.

3. If the jury should find that, on the 20th of June, 1795, a patent emanated from the Spanish government to Joseph Pannell, under whom the defendant claimed, then such patent constituted a good

title in the grantee and those claiming under him, although the grantee was not, on the 27th of October, 1795, an actual resident of the territory ceded by Georgia to the United States.

4. If the jury should believe that Joseph Pannell, under whom the defendant claimed, on or before the 27th of October, 1795, was a resident of the said territory, and that he claimed the premises in controversy by virtue of a Spanish patent legally and fully executed prior to that day, the defendant is entitled to a verdict.

5. That the paper purporting to be a copy of the articles of agreement between Joseph Pannell and Francis Poussett, dated September 20, 1796, was competent testimony to prove any fact in controversy between the parties in this suit.

6. If the jury should be of opinion that the date attached to the paper purporting to be the instructions from William Dunbar to William Atcheson, is an interpolation or forgery, in such case they shall disregard it altogether.

7. In this action of ejectment, after a long and continued possession of thirty years, on the part of the defendant and those under whom he claims, under title or color of title, the jury are [*533] authorized to presume that it had a legal * origin, and was legally continued in the defendant and those under whom he claims, in the absence of satisfactory proof to the contrary.

8. If the jury should believe that the survey made by William Atcheson, in September, 1795, was made at the time it purports to bear date, that then, and in such case, it will constitute an instrument of a higher and superior nature to the instrument purporting to be private instructions from said Dunbar to said Atcheson, for the purpose of proving the residence of the said Pannell at that time.

9. That if, on the whole matter, the jury should have a reasonable doubt, then their verdict should be for the defendant.

The court granted the 4th, 6th, 7th, and 9th prayers, but refused the 1st, 2d, 3d, 5th, and 8th, to which refusal the counsel for the defendant excepted.

In argument, two general questions have been made.

1. Is the title set up by the plaintiff in error under the Spanish government, sufficient in itself to protect his possession?

2. Has it been recognized and confirmed by the United States?

1. The first point has been argued very elaborately, and with deep research. The court will not enter into the reasoning of the parties, but will state the result of an attentive consideration of that reasoning.

It is undoubtedly true, that the exact boundary line between the southern British colonies and Florida, was never adjusted while that province remained in possession of Spain. Each crown claimed

territory which had been granted by the other, and was settled by its subjects. Florida was at length ceded to Great Britain; after which, the 31st degree of north latitude was, by the proclamation of 1763, established as the dividing line between that province and Georgia. The crown, however, was in the habit of changing the limits of the colonies; and, though we complained of the manner in which this branch of the prerogative was exercised, we did not resist it. In consequence of a recommendation of the board of trade, the limits of Florida were supposed to be extended, as appears by the commissions to * its governor, so as to comprehend the land [*534] in controversy. This was the state of things when the war of our Revolution commenced. In its progress Spain took part in it, and reconquered Florida. At the treaty by which that war was terminated, Great Britain acknowledged the United States to be free, sovereign, and independent, and treated with them as such. Their boundaries were particularly described, so as to comprehend the land in controversy. The preliminary articles of peace between the United States and Great Britain were signed at Paris on the 30th of November, 1782.[1] But these articles were provisional, and were not to take effect until terms of peace should be agreed upon between Great Britain and France. On the 20th of January, 1783, preliminary articles of peace were signed between Great Britain and France, and between Great Britain and Spain. In the treaty with Spain, the Floridas were ceded to that power without any description of boundary.

The United States continued to assert a claim to the 31st degree of north latitude, while Spain maintained perseveringly her pretensions to extend further north. This was the subject of long and fruitless discussion between the two governments, which was terminated by the treaty signed at San Lorenzo el Real, on the 27th day of October, 1795.[2] By this treaty, "the high contracting parties declare and agree, that the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the River Mississippi, at the northernmost part of the 31st degree of latitude north of the equator, which from thence shall be drawn due east to the middle of the River Appalachicola, or Catahouchee; thence," &c. This treaty declares and agrees that the line which was described in the treaty of peace between Great Britain and the United States as their southern boundary, shall be the line which divides their territory from East and West Florida.

[1] 8 Stats. at Large, 54. [2] Ib. 138.

The article does not import to be a cession of territory, but the adjustment of a controversy between the two nations. It is understood as an admission that the right was originally in the United States. Nor is there any thing extraordinary in this admis-
[*535] sion. The negotiations were all *depending at the same time and the same place. That between the United States and Great Britain was first completed and signed; it must have been communicated to France, and, of course, was known to Spain; in it the southern boundary of the United States was accurately defined. The subsequent cession of the Floridas to Spain contained no description of boundaries. Great Britain could not, without a breach of faith, cede to Spain what she had acknowledged to be the territory of the United States. No general words ought to be so construed. We think that Spain ought to have understood the cession, and must have understood it as being made only to the extent that Britain might rightfully make. This opinion is confirmed by a subsequent part of the same article, which respects the troops, &c., of either party in the territory of the other. It is in these words: "And it is agreed that, if there should be any troops, garrisons, or settlements of either party in the territory of the other, according to the above-mentioned boundaries, they shall be withdrawn from the said territory within the term of six months after the ratification of this treaty, or sooner if it be possible; and that they shall be permitted to take with them all the goods and effects which they possess."

It has been very truly urged by the counsel for the defendant in error, that it is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. An article to secure this object, so deservedly held sacred in the view of policy as well as of justice and humanity, is always required, and is never refused. Had Spain considered herself as ceding territory, she could not have neglected a stipulation which every sentiment of justice and of national honor would have demanded, and which the United States could not have refused. But instead of requiring an article to this effect, she has expressly stipulated for the withdrawal of the settlements made within what the treaty admits to be the territory of the United States, and for permission to the settlers to bring their property with them. We think this an unequivocal acknowledgment, that the occupation of that territory by Spain was wrongful; and we think the opinion thus clearly indi-
[*536] cated was supported *by the state of facts. It follows that Spanish grants made after the treaty of peace, can have no intrinsic validity, and the holders must depend for their titles on the laws of the United States. We proceed, then, to inquire into the rights of the plaintiff in error under those laws.

The first act to which our attention has been directed, is that by which Georgia ceded her western territory to the United States. That act provides: "That all persons who, on the 27th day of October, 1795, were actual settlers within the territory thus ceded, shall be confirmed in all the grants legally and fully executed prior to that day, by the former British government of West Florida, or by the government of Spain."

On the 3d of March, 1803, vol. 3, s. 546,[1] congress passed "An act regulating the grants of land, and provided for the disposal of the lands of the United States south of the State of Tennessee."

The first section enacts that any person or persons "who were resident in the Mississippi territory on the 27th day of October, 1795, and who had, prior to that day, obtained, either from the British government of West Florida or from the Spanish government, any warrant or order of survey for lands lying within the said territory, to which the Indian title had been extinguished, and which were, on that day actually inhabited and cultivated by such person or persons, or for his or their use, shall be confirmed in their claims to such lands, in the same manner as if their titles had been completed."

This section places those persons who had obtained a warrant or order of survey on the 27th of October, 1795, on equal ground with those whose titles were completed, provided the Indian title was extinguished, and provided also the land claimed was actually inhabited and cultivated, either by the person claiming title, or by some other for his use.

The second section provides for those who did, on that day of the year 1797, when the Mississippi territory was finally evacuated by the Spanish troops, actually inhabit and cultivate a tract of land in that country; and the third *section gives a preëmp- [*537] tion to those who did actually inhabit and cultivate a tract of land at the time of passing the act.

The 4th section enacts that two land-offices shall be established for the disposal of the lands of the United States in the Mississippi territory, one in the county of Adams, and the other in the county of Washington; and the 5th directs "that every person claiming lands by virtue of any British grant, or of the first three sections of the act, or of the articles of agreement and cession between the United States and the State of Georgia, shall, before the last day of March, in the year 1804, deliver to the register of the land-office within whose district the land may be, a notice in writing, stating the nature and extent of his claims, together with a plat of the tract or tracts claimed; and shall also, on or before that day, deliver

[1] 2 Stats. at Large, 229.

to the said register, for the purpose of being recorded, every grant, order of survey, and conveyance or other written evidence of his claim, and the same shall be recorded," &c.; "and if such person shall neglect," &c., "all his right, so far as the same is derived from the above-mentioned articles of agreement, or from the first three sections of this act, shall become void, and forever thereafter be barred."

The 6th section directs the appointment of two boards of commissioners, for the purpose of ascertaining the right of persons claiming the benefit of the articles of agreement and cession between the United States and the State of Georgia, or of the first three sections of the act. One of these boards was to take cognizance of claims to lands lying west of Pearl River, and the other of claims to lands lying east of that river. Each board was empowered to hear and determine, and decide, in a summary manner, all matters respecting such claims within their respective districts; and their determination, so far as relates to any rights derived from the articles of agreement with Georgia, and from the first three sections of the act, was declared to be final. The act proceeds to direct that each board may appoint a clerk, "whose duty it shall be to enter in a book to be kept for that purpose, perfect and correct minutes of the proceedings, decisions, meetings, and adjournments of [*538] the boards, together with the *evidence on which such decisions are made; which books and papers, on the dissolution of the boards, shall be transmitted to and lodged in the office of the secretary of state. The commissioners are directed to grant certificates to all persons in whose favor decisions shall be made, which certificates are to be recorded by the register of the land-office, and amount, in all cases where grants have been made, to a complete relinquishment on the part of the United States; and, where grants have not been made, entitle the party to receive one from the United States.

A supplemental act was passed, in March, 1804, which prolonged the time until the last day of November in that year, for giving the notice prescribed by the fifth section of the original act, to the register of the land-office, of claims to lands lying west of Pearl River, for the purpose of being recorded. This act provides that in cases of a complete British or Spanish grant, it shall not be necessary for the claimant to have any other evidence of his claim recorded except the original grant or patent, together with the warrant or order of survey, and the plot. The 3d section enacts, "that when any Spanish grant, warrant, or order of survey shall be produced to either of the said boards, for lands which were not, at the date of the instrument or within one year thereafter, inhabited, cultivated, or occupied

by or for the use of the grantee, or whenever either of the said boards shall not be satisfied that such grant, warrant, or order of survey did issue at the time when the same bears date, the said commissioners shall not be bound to consider such grant, warrant, or order of survey as conclusive evidence of the title, but may require such other proof of its validity as they may deem proper; and the said boards shall make a full report to the secretary of the treasury, to be by him laid before congress for their final decision, of all claims grounded on such grants, &c., as may have been disallowed by the said boards, on suspicion of their being antedated or otherwise fraudulent."

It is contended by the plaintiff in error that these several acts confirm the titles of all those who held lands under the Spanish government, by virtue of grants or orders of survey which were made with good faith prior to the 27th day of * October, in [* 539] the year 1795. The defendant in error maintains that they confirm the titles of those only who were actual settlers of the Mississippi territory anterior to that day.

It is admitted that the State of Georgia, in its act of cession, has stipulated for those only who were actual settlers on the 27th of October, 1795, and who held grants legally and fully executed at that time.

The first section of the act of 1803 comprises incomplete titles only, and does not extend to those which were comprehended in the act of cession. It is, in terms, limited to actual settlers; and no person who was not an actual settler can claim under that act. The silence observed by congress respecting grants fully executed, countenances the opinion that the articles of agreement between the United States and Georgia were supposed to be in themselves a confirmation of the titles of those who were within the words of the instrument. But as the legislature was making provision for the sale of the vacant lands within the ceded territory, it was deemed necessary to ascertain the particular lands which were appropriated. The 5th section of the act, therefore, requires that every person having such claims shall, before the last day of March, in the year 1804, deliver a notice in writing, specifying the extent of his claims, to the register of the land-office, together with his title papers, that they may be recorded. On failure, his title, so far as it is derived from the first three sections of the act, or from the articles of agreement with Georgia, shall become void; nor shall such title paper "be considered or admitted as evidence in any court of the United States, against any grant derived from the United States."

So far as titles were derived from the act itself, no person could

complain of this restriction. It was, however, a very rigorous law as respected those who were protected by the articles of agreement of Georgia.

This act certainly contains no confirmation of Spanish titles, except of those which were held by persons who were actual settlers at the time prescribed in the law itself. It provides for the sale of all the unappropriated lands, and establishes a tribunal with power to decide on all titles.

[* 540] *The language of the act of the 27th of March, 1804, is less explicit. It declares, "that persons claiming lands in the Mississippi territory, by virtue of any British or Spanish grant, or by virtue of the first three sections of the act to which this is a supplement, or of the articles of agreement and cession with the State of Georgia, may, after the last day of March, in the year 1804, and until the last day of November then next following, give notice in writing of their claims to the register of the land office, for the lands lying west of Pearl River, and have the same recorded, in the manner prescribed by the 5th section of the act to which this is a supplement."

The defendant in error contends that, although the descriptive words of the act apply generally to persons claiming lands under British or Spanish grants, they ought to be confined to the actual settlers of the country. This construction rests chiefly on the argument that the act of 1804 is a mere supplement to the act of 1803; that the two laws ought to be construed together; that their great object is to quiet possession, and that the main purpose is to give a longer time for recording claims to lands lying west of Pearl River.

There is, we think, great difficulty in maintaining this construction. It has been observed, and the observation has great weight, that all British and Spanish grants held by persons who were actual inhabitants of the country, on the 27th of October, 1795, were protected by the articles of agreement with the State of Georgia. Yet these persons are enumerated in the act as constituting a distinct class of claimants not provided for in that compact. The inference is very strong that congress must have supposed there was such a class. The concluding words of the section indicate the same idea. They are, "and the powers vested by law in the commissioners appointed for the purpose of ascertaining the claims to lands lying west of Pearl River, shall, in every respect, extend and apply to claims which may be made by virtue of this section; and the same proceedings shall thereupon be had as are prescribed by the act aforesaid, in relation to claims which shall have been exhibited on or before the last day of March, in the year 1804."

*This language we think adapted to new claims, as well [*541] as to a prolongation of the time in which claims may be recorded, as the preparatory step to laying them before the commissioners. It is observable, too, that the 5th section of the act of 1803 mentions British, but not Spanish grants. They are comprehended in that class of claims which were confirmed by the articles of agreement with Georgia. The act of 1803 contemplates no Spanish grant that was not protected by those articles. The act of 1804, however, introduces Spanish with British grants, and places them together, as forming a class of cases not provided for in the compact with Georgia. We cannot suppose that the legislature would have changed its language, and have introduced the words Spanish grants, with directions that they should be recorded, and laid before the commissioners, if nothing existed to which the words would be applicable.

The language of the 3d section, also, indicates an opinion that persons not inhabitants of the country on the 27th of March, 1795, might be entitled to land under a Spanish grant, warrant, or order of survey. It provides for the case of a claim to land which was not, at the date of such grant, &c., or within one year thereafter, inhabited, cultivated, or occupied by or for the use of the grantee. Now, land might be inhabited, cultivated, or occupied, for the use of a grantee who was not himself an inhabitant of the country, or might be occupied by himself within one year after the date of the grant, though not so occupied on the 27th of October, 1795. The act goes on to provide that, in such case, or whenever the commissioners shall not be satisfied that the grant, &c., issued at the time it bears date, such grant, &c., shall not be conclusive evidence of the title. This language might certainly justify the implication that congress supposed the commissioners might establish titles in favor of non-residents.

The decision of the commissioners against them is not to be final. They are to be reported to the secretary of the treasury, to be by him laid before congress for the final decision of that body.

On the 28th of February, 1809,[1] congress appears to have acted on this report. An act was then passed directing the *lands, the claims to which had been disallowed by the [*542] commissioners, to be sold in the same manner as other public lands. The same act reserves the right of the Spanish claimant to institute his suit in the highest court of law or equity in the said territory, for the recovery of the land, within one year after it.

[1] 2 Stats. at Large, 526.

shall have been sold by the United States. If he shall fail to sue within the time limited, his right to sue shall be forever barred. The 2d section makes the decision of such cause to depend entirely on the claimant's proving that the survey was made before the 27th of October, 1795, and on the fairness of the transaction; and the 3d section declares parol evidence to be admissible.

This act relates solely to those claims which were laid before the commissioners, and disallowed.

The patent under which the plaintiff in error claims the tract of 1,000 acres, appears to have the following indorsements on it:—

"Entered on record at Natchez, in the county of Adams, Mississippi territory, in lib. B, fol. 149 a 150, this second day of April, A. D. 1801. JOHN HENDERSON, *Recorder.*"

"*Land-Office west of Pearl River.*

"This plat, certificate, and letters-patent, are recorded in the register's book B, of written evidences of claims, fol. 621, &c.

"Examined and corrected by J. GIRAULT, *Translator.*"

The plat and certificate of survey, and patent for 500 acres, appear to have been registered in the land-office west of Pearl River, on the 26th of March, 1804.

The patent for this last survey gives no additional title, because it was granted after the authority of Spain over the country had ceased. It does not appear that either of these title papers was laid before the board of commissioners.

There is certainly some difficulty in construing these acts of congress. It is not easy to resist the conviction that the government has legislated on the idea that Spanish titles might be valid, [*543] though held by persons who were not *residents of the country on the 27th of October, 1795. Yet no law has, in express terms, imparted this validity to them. The act of 1804 allows them to be recorded, and to be laid before the commissioners, to be decided on by them. It goes further, and seems to point the attention of the commissioners to the fairness of the claim, rather than to the residence of the claimant. The certificate of the board in favor of the claimant is conclusive against the United States. Their determination against him is to be reported to the secretary of the treasury, in order to be laid before congress; and this determination is to be founded on the opinion that the document of title is antedated or otherwise fraudulent. When congress acts on this report, no absolute decision is made against the rejected claims, but the claimant is allowed time to assert his title in a court of law or

equity. These provisions are scarcely to be reconciled with the idea that no Spanish grant could be valid, if made to a non-resident of the territory. It would seem as if the commissioners might have taken cognizance of such a claim, might have decided in its favor, and that such a decision would have been conclusive.

But, we repeat, that there is no act of congress expressly confirming such titles, and that they derive no validity from any other source.

The whole legislation on this subject requires that every title to lands in the country which had been occupied by Spain, should be laid before the board of commissioners. The motives for this regulation are obvious; and as the titles had no intrinsic validity, it was opposed by no principle. Claimants could not complain if the law which gave validity to their claims should also provide a board to examine their fairness, and should make the validity depend on their being laid before that board. The plaintiff in error has failed to bring his case before the tribunal which the legislature had provided for its examination, and has therefore not brought himself within the law. No act of congress applies to a grant held by a non-resident of the territory in October, 1795, which has not been laid before the board of commissioners. It is true that no act has declared such grants void; but the legislature has ordered the lands to *be [*544] sold which were not appropriated in a manner recognized by law, and the land in controversy is of that description.

If this view of the subject be correct, no Spanish grant made while the country was wrongfully occupied by Spain, can be valid unless it was confirmed by the contract with Georgia, or has been laid before the board of commissioners.

This opinion is decisive of every point on which the court gave an opinion, so far as respects title.

The first bill of exceptions, taken by the plaintiff in error, is to the rejection of a duly certified copy of a certificate of survey, and a patent issued thereon by the Spanish governor of West Florida, in December, 1797.

The patent was properly rejected, because Spain no longer occupied the territory, and the authority which had been exercised, in fact, by the Spanish government, had ceased. The order and certificate of survey were properly rejected, because they were not confirmed by the first three sections of the act of 1803, and had never been laid before the board of commissioners.

The paper dated the 19th of October, 1796, purporting to be private instructions from William Dunbar, the principal surveyor of the district of Natchez, to William Atchison, the deputy who made

the surveys for the land in controversy, was admitted to rebut the testimony of a witness whose deposition had been taken to prove that the Spanish title papers were fair, and were correctly dated. This paper was admitted, because it related to the official duties of the deputy, was found among his papers after his death, and was proved to be in the handwriting of his principal, who was also dead. Doubts are entertained by some of the judges respecting the propriety of its admission. But this is a question which we think it unnecessary to decide, because the grant not having been laid before the board of commissioners could not have availed the defendant in the court below, who did not bring himself within the reservation of the cession from Georgia.

The plaintiff in error, after the testimony had been laid before the jury, prayed the court to instruct them on several points of [*545] law which grew out of it. The first of these, *which was refused, questioned the validity of a grant made by the United States for land occupied at the time under color of an adverse title. There can be no doubt of the correctness of rejecting this proposition.

The 2d, 3d, and 5th points, which the court was prayed to state as law to the jury, depend on the position that residence in the country on the 27th of October, 1795, was not necessary to the validity of the title set up by the defendant in that court. As the title had not been laid before the board of commissioners, and as residence was indispensable to the validity of a claim, supported by the act of cession from Georgia, we think these instructions were properly refused.

The 8th was unimportant to the case in the view which this court has taken of it. If the question, whether the survey, purporting to bear date in September, 1795, was really made on that day, or was antedated, had been the question to be decided by the jury, as it would have been had this paper been laid before the board of commissioners, the court did right in refusing to grant this prayer. It seems to request the court to say that, in deciding on the verity of a paper alleged to be fraudulent, the paper itself is entitled to more credit than the parol testimony which impeaches it, though the law declares parol testimony to be admissible.

On the other points, the court gave the instruction asked by the plaintiff in error.

We think the plaintiff in error has neither brought himself within the articles of agreement between the United States and the State of Georgia, nor within the acts of congress; and that the judgment of the district court must be affirmed, with costs.

1 P. 94; 6 P. 691; 11 P. 351; 12 P. 410, 657; 14 P. 353; 3 H. 212, 750; 6 H. 31; 9 H. 155; 10 H. 627.

THE ANTELOPE. The Spanish and Portuguese Consuls, Claimants.

12 W. 546.

Further explanation of the decree of this court, in S. C. 10 W. 56, and 11 W. 413.

The Africans captured, except those restored to the Spanish claimants, to be delivered to the United States, absolutely and unconditionally, without the precedent payment of expenses.

No judgment or decree can be rendered directly against the United States for costs and expenses.

The fees and compensation to the marshal, for keeping &c., captured Africans, where his fees or compensation are chargeable to the United States, are to be paid out of the treasury, upon a certificate of the amount, to be made by the court, or one of the judges.

THIS cause was argued by the *Attorney-General* and *Key*, for the appellants, and by *Berrien*, *C. J. Ingersoll*, and *Wilde*, for the respondents.

TRIMBLE, J., delivered the opinion of the court.

This case having been before this court, and a decree rendered therein at February term, 1825, and again brought up and an explanatory decree made therein, at February term, 1826, the reports of the case in 10 W. 66, and 11 W. 413, are referred to for the general history of its facts and circumstances, and for the principles settled in it by the former decrees of this court. The case was remanded to the circuit court, with directions to make a
*final disposition of the controversy between the parties, [*547]
pursuant to the principles of the decrees, of 1825 and 1826,
of this court.

The circuit court, in order to enable it to decree finally in the case, directed the register to take and report an account of the costs, and also of the expenses of keeping, maintaining, &c., of the Africans, by the marshal, and which account was accordingly reported. Exceptions were filed to the report by both the Portuguese and Spanish claimants.

The circuit court also caused proofs to be taken for the purpose of identifying individually the Africans to be delivered to the Spanish claimants, as directed by the decree of 1826.

Thus circumstanced, the case came on for final hearing before the circuit court. The court decreed that the Portuguese claimant should not be made liable for costs, or any proportion of the expenses and charges of the marshal for maintaining, &c., the Africans; and being of opinion that thirty-nine of the Africans were sufficiently identified by proof, as being the property of the Spanish claimants, directed the thirty-nine Africans, so identified, to be delivered to the Spanish claimants, upon their paying a proportion of the costs and expenses reported by the registrar, in the ratio of the number of

Africans delivered, to the whole number; and the circuit court was further of opinion that the residue of the Africans not directed to be delivered to the Spanish claimants, should be delivered to the United States, to be disposed of according to law; but, on the question whether they shall be delivered absolutely, or on condition of payment of the balance of the expenses which will remain unsatisfied after charging the Africans adjudged to the Spanish claimants in their due ratio, the judges of the circuit court being divided in opinion, ordered this difference of opinion to be certified to this court.

The case comes up on this certificate of division, and also upon an appeal prayed by the district attorney on behalf of the United States, and allowed: "From so much of the said final order of the circuit court as relates to the apportionment among the several parties, of the costs and expenses, in the preservation, maintenance, [* 548] *and custody of the said Africans, and of the costs and expenses of the various proceedings which have been had in relation to the said Africans, and also from so much of said order as decrees thirty-nine of the said Africans to the Spanish claimants."

We will first consider the question arising upon the certificate of division of opinion between the judges of the circuit court.

It appears, from the opinion delivered by the circuit court and from the registrar's report, that, in making up that report as to the amount of expenses, sixteen cents *per diem* was allowed the marshal for the custody, maintenance, &c., of the Africans; and the Spanish claimants were charged, as a condition precedent, with the proportion of expenses of the marshal, after this rate, in the ratio of the number of Africans to be delivered to them. The residue of the marshal's expenses, at the same rate *per diem*, is supposed to be meant by the term "expenses," in the question on which the judges were opposed in opinion; and it is supposed the question upon which the judges were opposed in opinion was, whether the Africans not directed to be delivered to the Spanish claimants, should be delivered by the marshal to the United States, absolutely and unconditionally, to be disposed of according to law, or whether it should be imposed on the United States as a condition precedent to their delivery, that the United States should pay to the marshal his claim for expenses at the rate aforesaid, in the ratio of the number of Africans to be delivered to the United States.

The Spanish claimants have not appealed from the decree of the circuit court. As the court had decided that they ought to bear some proportion of the expenses, it was necessary, for the purpose of ascertaining the amount which they were to pay, to fix upon some data for making up the account of expenses, so far as related to them

But as they do not complain, this court is not called upon to decide whether they were overcharged or not, nor to determine whether the rate of sixteen cents *per diem* was warranted by law, as the circuit court supposed, so far as the Spanish claimants are concerned.

As relates to the United States, the question pro- [* 549]
pounded by the judges of the circuit court, and upon which they were divided in opinion, does not necessarily draw in question the data or rate of the marshal's allowance for expenses; but whether the payment of his expenses, at any rate or to any amount, ought to be made a precedent condition to the delivery of the Africans to the United States. It may well be doubted, however, whether the state law does, as supposed by the court, authorize the marshal to charge, as matter of right, sixteen cents *per diem* for keeping, maintaining, &c., the Africans; although it might furnish some guide, in an appeal to the sound discretion and justice of the government, in making him a reasonable compensation. It is true, the 1st section of the "Act for providing compensation for the marshal," vol. 3, c. 125,[1] after declaring the fees and compensation to be allowed the marshal for certain enumerated services, &c., adds: "For all other services not herein enumerated, such fees or compensation as are allowed in the supreme court of the State where the services are rendered." This has generally been construed, and we think rightly, to mean, that where the services performed are not enumerated in the act of congress, but such services are enumerated, and a fixed allowance made therefor in the state laws, they shall fix the rule of compensation. The case under consideration is wholly unprovided for by the laws and usages of the State. The Africans to be delivered to the United States are neither slaves, in contemplation of law, nor prisoners of war, nor persons charged with crimes. The compensations allowed by the laws of the State to sheriffs and jailers, in these cases, do not, therefore, furnish any positive rule of law or right, as to the compensation which ought to be allowed the marshal, in the peculiar circumstances attending these Africans. He is, no doubt, entitled to a reasonable compensation; but that must depend upon the circumstances of the case, and not any positive rule. But, be that as it may, it could not legally enter into the judgment and decree of the court, so far as that judgment or decree was to affect the rights of the United States, or the rights of the marshal as against the United States. It is a gen- [* 550]
eral rule, that no court can make a direct judgment or decree against the United States, for costs and expenses, in a suit to

[1] 1 Stats. at Large, 624.

which the United States is party, either on behalf of any suitor or any officer of the government. As to the officers of the government, the law expressly provides a different mode.

The 3d section of the "Act for regulating process," &c., vol. 2, c. 137,[1] makes provision for the fees and compensation to be allowed the marshal, similar to the "Act for providing for compensation to marshals," &c., above cited. The 4th section makes some further regulations concerning the fees and compensation to be allowed clerks and marshals, and then provides, "that the same, having been examined and certified by the court, or one of the judges of it, in which the services shall have been rendered, shall be passed in the usual manner at, and the amount thereof paid out of, the treasury of the United States," &c.

These provisions show, we think incontestably, that, whether the marshal's fee and compensation for services rendered the United States be fixed by some positive statutory rule, as in enumerated services, or depends upon what is reasonable and just under the circumstances of the case, as in non-enumerated services, they must be certified to and paid out of the treasury, and cannot lawfully constitute any part of the judgment or decree in the cause. It would, indeed, be extraordinary, if the marshal, who is the servant of the government, and holds possession of the Africans merely by its authority, could obstruct the operations of the government by a claim for compensation for his services. The laws give the marshal no lien on the Africans; and we can discover no principle which will justify the court in creating a lien, in effect, by its decree. There is no necessity for such a proceeding.

The 7th section of "An act in addition to the acts prohibiting the slave-trade,"[2] appropriates $100,000 to carry the law into effect. The 2d section of the act authorizes the President of the United States to make such regulations and arrangements as he [* 551] may deem * expedient, for the safe-keeping, support, and removal, beyond the limits of the United States, all such negroes," &c., vol. 5, c. 511.

It is not to be doubted that, if a reasonable account for expenses were certified according to law, arrangements would be made to pay it out of the fund appropriated for carrying into effect the laws prohibiting the slave-trade.

We are of opinion it ought to be certified to the circuit court that all the Africans captured in The Antelope, except those directed to be delivered to the Spanish claimants, should be decreed to be deliv-

[1] 1 Stats. at Large, 276. [2] 3 Ib. 532.

ered to the United States, absolutely and unconditionally, without the precedent payment of expenses.

In that part of the case brought up by appeal, it is insisted, on behalf of the United States, that so much of the decree of the circuit court "as relates to the apportionment among the several parties of the costs and expenses in the preservation, maintenance, and custody of the Africans, and the costs and expenses of the various proceedings which have been had in relation to said Africans," is erroneous. It is contended that these costs and expenses were occasioned by the prosecution of a groundless claim by the Portuguese and Spanish claimants, and that they should have been decreed to pay them.

It may well be doubted whether these questions are now open to discussion. By a former order and decree of the circuit court, made before the former appeals, the ordinary costs and charges were regulated, and they were paid accordingly; that order is not now before this court in this appeal. By the former decree of the circuit court, rendered before the former appeals, a principle was established as to the ratio in which the Spanish and Portuguese claimants should be chargeable with the expenses of maintenance, &c. The principle was, that they should be charged in the ratio of the number of Africans to be delivered to them respectively.

There was no appeal from that part of the former decree of the circuit court; or, if there was, it was virtually affirmed by the former decree of this court.

In the application of the principle to the case as it now
*stands, it seems to follow, necessarily, that as none of the [*552]
Africans are to be delivered to the Portuguese claimant, he should pay none of the expenses of keeping them; and that the Spaniard should pay in the ratio of thirty-nine, the number to be delivered to him. The condition of the Portuguese consul, too, is very peculiar. Under the circumstances in which these Africans were captured and brought into the United States, it was his duty to interpose a claim for part of them, on behalf of the subjects of his Majesty, the king of Portugal. That claim was sustained in the district and circuit courts, and the general propriety of the claim was also recognized by the former decree of this court, but as no individual Portuguese claimant of the property appeared before the hearing of the appeal, the claim of the vice-consul of Portugal was dismissed on that ground. It would be too much to visit him with the extraordinary expenses under such circumstances, and he has heretofore paid his proportion of the ordinary expenses of the suit.

We think there is no just ground of complaint, on the part of the United States, that the Spanish claimants have not been burdened with more than a ratable proportion of the expense of keeping the Africans.

It only remains to be inquired, whether the circuit court erred in directing thirty-nine of the Africans to be delivered to the Spanish claimants.

It has been argued that there is no credible and competent evidence to identify them or any of them.

We are not of that opinion. We think that, under the peculiar and special circumstances of the case, the evidence of identity is competent, credible, and reasonably satisfactory, to identify the whole thirty-nine.

It ought not to be forgotten that, in the original cause, it had been established to the satisfaction of this court, that ninety-three of the Africans brought in with The Antelope were the property of the Spanish claimants; but, as many of the Africans had died, it was the opinion of this court that number should be reduced according to the whole number living. The circuit court, proceeding upon this principle, fixed the whole number to which the Spanish
[* 553] claimants * were entitled at fifty, and then proceeded to inquire as to their identity.

Grondona, who had been examined as a witness in the original cause, was second officer on board The Antelope, when the Spanish Africans were purchased, and put on board The Antelope, on the coast of Africa.

It appears that the Africans captured and brought in with The Antelope, were put into the possession of Mr. William Richardson; and that he had about fifty of them employed at work upon the fortifications at Savannah; that while there, Grondona came out with the marshal for the purpose of identifying the Spanish Africans; that the fifty Africans were drawn up in a line; that Grondona made signs, and spoke to the negroes, and they to him, and they generally appeared to recognize him as an acquaintance. On cross-examination, he says he cannot say that every one of the negroes recognized the sign made by the person accompanying the marshal to the fortifications, but that they generally did.

The Africans of The Antelope being paraded in front of the court-house, Mr. Richardson was directed by the court to point out and designate, individually, the Africans who had worked on the fortifications, and he designated thirty-four. It is proved by Mr. Morel, the marshal, that Grondona recognized five others, who were with other persons, and that they appeared to recognize Grondona as an

acquaintance. These five are described by name, and pointed out by other witnesses.

Before these proofs were taken in open court, for the purpose of identifying the Africans claimed by the Spaniards, Grondona had disappeared, and it is suggested was dead. He had, however, in his examination as a witness in chief in the cause, shown that he was an officer on board, and knew the Africans belonging to the Spanish claimants. Grondona and the Africans both spoke languages not understood by the witnesses; yet it could well be seen by them that Grondona and the Africans knew and understood each other; and Mr. Richardson swears that many of them appeared to know him very well, and that he claimed them as *part of [*554] the Africans originally put on board The Antelope, by the Spanish owners.

We think this evidence was sufficient, under the very peculiar circumstances of this case, reasonably to satisfy the mind of the identity of thirty-nine of the Africans as belonging to the Spanish claimants.

8 P. 150.

M'LEMORE, Plaintiff in Error, *v.* POWELL and others, Defendants in Error.

12 W. 554.

A mere agreement by the holder with the drawer for delay, without a consideration, and not communicated to the indorser, does not discharge the indorser.

THIS cause was argued by *White* and *Eaton*, for the plaintiff in error, and by *Webster* and *Bliss*, for the defendants in error.

*STORY, J., delivered the opinion of the court. [*555]

This is a writ of error to the circuit court of the United States for the district of West Tennessee.

The original action was *assumpsit*, brought by Powell, Fosters, and Co., as holders of a bill of exchange, drawn by one Thomas Fletcher, in May, 1819, at Nashville, upon Messrs. M'Neil, Fisk, and Rutherford, at New Orleans, payable to Thomas Read, or order, for two thousand dollars, in sixty days after date, and by him indorsed to the defendant, John C. M'Lemore, and by him to the plaintiffs. The bill, upon presentment for acceptance, was dishonored, and due notice of the dishonor was given to the defendant.

At the trial, upon the general issue, Thomas Fletcher, the drawer, was, under a release from the defendant, M'Lemore, examined as a witness, and, among other things, testified that, in the month of

October following the dishonor of the bill, "one of the plaintiffs applied to him, at Nashville, for the money on the bill, and threatened to sue immediately if an arrangement was not made to pay the bill. The witness then proposed to the plaintiff, if he would indulge him four or five weeks, he would himself, to a certainty, pay the bill. To this the plaintiff agreed, and told the witness he was going to Louisville, Kentucky, and would return by Nashville about the expiration of that time, and would receive said payment. Since said time the witness has never seen said plaintiff." The witness further testified that the defendant was an accommodation indorser for him on the bill; that the plaintiff told him that the bill would be left with a Mr. Washington, at Nashville; that he expected he would himself be at that place at the time agreed on, but that, if he did not come, he would give the instructions to Mr. Washington, by letter, what to do if the witness did not pay at the expiration of the time agreed on. It did not appear that any consideration was paid or stipulated for this delay; and no suit was commenced until after this period had elapsed. The district judge instructed the jury that if they believed the conversation above stated amounted to no more than an agreement that a suit should not be brought for four or five weeks, and that no premium or consideration was given or paid, or to [* 556] be paid by Fletcher, the indorsers were not discharged; * that an agreement for giving day must be an obligatory contract, for a consideration which ties up the hands of the creditor, and disables him from suing, thereby affecting the interests and rights of the indorser; that the indorser has a right to require and demand of the creditor to bring a suit against the drawer, and if he has disabled himself from bringing a suit, by a contract for a consideration, he has thereby released the indorser; and that, if the jury were satisfied from the testimony that time was given for a valuable consideration paid or to be paid, or that a new security was taken by the holder, that the indorser was discharged and absolved from all the obligations of the indorsement.

Under this instruction, the jury found a verdict for the plaintiffs, upon which there was judgment given in their favor. A bill of exceptions was taken to the charge of the court; and the present writ of error is brought for the purpose of ascertaining its legal correctness.

It is unnecessary to give any opinion upon that part of the charge which respects the right of an indorser to require the holder to commence a suit against the drawer. In general, the indorser, by paying the bill, has a complete power to reinstate himself in the possession and ownership of the bill, and thus to entitle himself to a personal remedy on the instrument, against all antecedent parties. The same

reason, therefore, does not exist, as may in common cases of suretyship, to compel the creditor to active diligence by suit against the principal. Without expressing any opinion on this point, it is sufficient to say that the error, if any, was favorable to the defendant, and, therefore, it can form no subject of complaint on his part.

The case, then, resolves itself into this question, whether a mere agreement with the drawers for delay, without any consideration for it, and without any communication with or assent of the indorser, is a discharge of the latter, after he has been fixed in his responsibility by the refusal of the drawee, and due notice to himself. And we are all of opinion that it does not. We admit the doctrine that although the indorser has received due notice of the dishonor of the bill, yet if the holder afterwards enters into any new agreement with the drawer for delay, in any manner * changing [* 557] the nature of the original contract, or affecting the rights of the indorser, or to the prejudice of the latter, it will discharge him. But, in order to produce such a result, the agreement must be one binding in law upon the parties, and have a sufficient consideration to support it. An agreement without consideration is utterly void, and does not suspend for a moment the rights of any of the parties. In the present case the jury have found that there was no consideration for the promise to delay a suit, and consequently the plaintiffs were at liberty immediately to have enforced their remedies against all the parties. It was correctly said by Lord Eldon, in English *v.* Darley, 2 Bos. & Pull. 61, that "as long as the holder is passive, all his remedies remain;" and, we add, that he is not bound to active diligence. But if the holder enters into a valid contract for delay, he thereby suspends his own remedy on the bill for the stipulated period; and if the indorser were to pay the bill he could only be subrogated to the rights of the holder, and the drawer could or might have the same equities against him as against the holder himself. If therefore such a contract be entered into without his assent, it is to his prejudice, and discharges him.

The cases proceed upon the distinction here pointed out, and conclusively settle the present question. In Walwyn *v.* St. Quintin, 1 Bos. & Pull. 652, where the action was by indorsees against the drawer of a bill, it appeared that after the bill had become due, and been protested for non-payment, though no notice had been given to the drawer, he having no effects in the hands of the acceptor, the plaintiffs received part of the money on account from the indorser; and to an application from the acceptor, stating that it was probable he should be able to pay at a future period, they returned for answer that they would not press him. The court held it no discharge, and

Lord Chief Justice Eyre, in delivering the opinion of the court, said that if this forbearance to sue the acceptor had taken place before noticing and protesting for non-payment, so that the bill had not been demanded when due, it was clear the drawer would have been discharged, for it would be giving a new credit to the [* 558] acceptor. But that, after protest for non-payment, * and notice to the drawer, or an equivalent to notice, a right to sue the drawer had attached, and the holder was not bound to sue the acceptor. He might forbear to sue him. The same doctrine was held in Arundel Bank *v.* Goble, reported in a note to Chitty on Bills. Chitty, 379, note c., ed. 1821. There the acceptor applied for time, and the holders assented to it, but said they should expect interest. It was contended that this was a discharge of the drawer; but the court held otherwise, because the agreement of the plaintiffs to wait was without consideration, and the acceptor might, notwithstanding the agreement, have been sued the next instant; and that the understanding that interest should be paid by the acceptor, made no difference. So, in Badnall *v.* Samuel, 3 Price's Exch. 521, in a suit by the holder against a prior indorser of a bill of exchange, it was held that a treaty for delay between the holder and acceptor, upon terms which were not finally accepted, did not discharge the defendant, although an actual delay had taken place during the negotiation, because there was no binding contract which precluded the plaintiffs from suing the acceptor at any time.

Upon authority, therefore, we are of opinion that this writ of error cannot be sustained, and that the judgment below was right. Upon principle, we should entertain the same opinion, as we think the whole reasoning upon which the delay of the holder to enforce his rights against the drawer is held to discharge the indorser after notice, is founded upon the notion that the stipulation for delay suspends the present rights and remedies of the holder.

The judgment of the court below is, therefore, affirmed, with costs.

6 P. 250; 14 P. 201; 5 H. 192.

The United States *v.* Priscilla Barker, Administratrix of Abraham Barker, deceased.

12 W. 559.

Wherever the government of the United States, through its lawfully authorized agents, becomes the holder of a bill of exchange, it is bound to use the same diligence, in order to charge the indorser, as in a transaction between private individuals.

Error to the circuit court for the eastern district of Pennsylvania. This was an action of *assumpsit* brought in the court below, by the

United States, against the personal representative of A. Barker, deceased, the indorser of several bills of exchange, drawn in the year 1814, by J. Barker, in New York, on different houses of trade in England. Among the bills, two were protested for non-acceptance, and two for non-acceptance and non-payment. It appeared in evidence at the trial, that the agent of the United States treasury, in New York, where the bills were drawn, and where the drawer and indorsers resided, received a letter from the secretary of the treasury, dated Washington, December * 7, 1814, request- [* 560] ing him to notify the drawer and indorsers of the non-acceptance of the first set of bills, and that notice was accordingly given to them on the 12th of December. It was further proved that the mail which left Washington on the 8th of the same month, arrived at New York at thirty-five minutes past 10 o'clock, A. M. on the 10th. It was also proved that the said agent received a letter from the secretary of the treasury, dated at Washington, May 8, 1815, directing him to give notice of the non-payment of the second set of bills of exchange, to the drawer and indorsers, and that they were notified on the 12th of the same month. It was further proved that the mail which left Washington, containing letters of the 8th of May, reached New York early in the morning of the 11th. But no notice of the non-acceptance of this second set of bills was proved.

The learned judges in the court below instructed the jury that the holders of the bill had not used due diligence. The letter of the 7th of December, 1814, must be considered as having been written on that day, and ought to have been put into the post-office to come by the mail of the 8th, and, if so, it would have reached New York on the morning of the 10th. That the letter of the 8th of May, 1815, should have been put into the post-office, to come by the mail of the 9th, and would have reached New York the morning of the 11th. The earliest notice alleged was on the 12th of May and December, respectively; and it seemed clear, either that the letters were not put into the post-office at Washington in due time, or that the agent in New York was guilty of negligence in giving notice to the parties, in either of which cases they were discharged.

A verdict and judgment was rendered upon this instruction in the court below, on which the cause was brought, by writ of error, to this court.

The *Attorney-General*, for the United States.

Webster for the defendant.

MARSHALL, C. J., delivered the opinion of the court.

[* 561] * That whatever doubts might be entertained as to the charge of the court below, relating to the transactions in England, (which it has not been thought necessary to state,) in respect to the protest and transmission of the bills, we think there is none as to what took place after their arrival at the treasury of the United States. The question was, whether notice of the dishonor of the bills was transmitted to the party within the time prescribed by the general law in respect to bills of exchange. The court were of opinion that there was negligence either at Washington or New York, as to giving such notice; and that the notice actually given was too late to fix him with the responsibility. The letter from the treasury department giving the notice, was either not sent in due course of mail to New York, or there was negligence at New York in not giving notice there as early as it should have been given, after the letter arrived at that city. Whether, therefore, the judge erred or not, as to the first part of his charge, in respect to the transmission of the bills from England in a reasonable time, there was no doubt that the United States had no right to recover, on account of the neglect in giving due notice after the return of the bills.

Upon this ground, the judgment of the circuit court was affirmed

15 P. 377; 5 H. 382.

PARKER and another *v.* THE JUDGES OF THE CIRCUIT COURT OF MARYLAND.

12 W. 561.

An injunction out of the circuit court, to stay proceedings on a judgment at law in that court, may issue, notwithstanding the pendency of a writ of error on the judgment in this court.

An injunction issued by order of the district judge, expires at the next term of the court, unless continued by the court; but the denial of several successive motions to dissolve the injunction, may, under circumstances, be considered as equivalent to an order for renewing it.

[* 562] * *Raymond*, for the plaintiffs, having, on a former day, obtained a rule to show cause why a *mandamus* should not issue to the judges of the circuit court of Maryland, cause was this day shown, and the question argued by *Raymond*, for the rule, and by the *Attorney-General*, against it.

MARSHALL, C. J., delivered the opinion of the court.

A rule was made upon the judges of the court of the United States for the fourth circuit and district of Maryland, to show cause why an execution should not issue on a judgment rendered in that court, in favor of Parkin, Parker, and Clough, against John E. Rigden. A

writ of error had been sued out to this judgment, which had been affirmed in this court, and the usual mandate had been awarded. On affidavit that the clerk of the circuit court had refused to issue an execution, and that the judges of that court had refused to direct one, this rule was made.

The cause shown is that, after suing forth the writ of error to the original judgment, Rigden had determined to abandon it. That the counsel who had obtained the judgment took the record from the clerk's office, filed it in this court, and obtained an affirmance of the judgment. Before this affirmance, John E. Rigden obtained an injunction to stay all proceedings at law on the said judgment, which the counsel for Parkin, Parker, and Clough have made two ineffectual attempts to dissolve; and that the said judges were and are of opinion that to issue execution during the continuance of the injunction, would be a violation thereof.

The record of the proceedings in chancery is annexed to this return, which shows that an injunction was awarded by Elias Glenn, the district judge, on the 19th of February, 1825, at which time the writ of error was depending in this court.

The subpœna was returnable to the May term of the circuit court, but the record does not state that any order was made in the cause at that term. In December, a rule was made on the defendants in equity to answer the bill. In * May, 1826, an answer [* 563] was filed for Parkin, Parker, and Clough, by William Gwynn and Daniel Raymond, their agents and attorneys, who moved to dissolve the injunction, which motion was rejected. Afterwards, in December, 1826, on the suggestion that there is no bond for the performance of any decree which might be pronounced in the cause, it was ordered by the court that the injunction be dissolved, unless cause be shown to the contrary on or before the 23d day of December, instant. On the 22d, this rule was extended. The bond given on obtaining the injunction, which had been mislaid, was found, and on the 26th the court, on argument, again refused to dissolve the injunction.

The cause, shown on the return, consists of two parts. 1. The supposed incorrect conduct of the counsel for the plaintiff at law, in bringing up the record after the defendant had abandoned his intention to prosecute the writ of error. 2. The pendency of the injunction.

The first cause shown is entirely insufficient. The plaintiff in error having given bond to prosecute his writ, was at liberty at any time to bring up the record; and, although the writ constituted no *supersedeas*, yet the party who had obtained the judgment would

remain exposed to the hazard of its being reversed at a distant day. To obviate such an inconvenience, one of the rules of this court authorizes the defendant in error, where the plaintiff has failed to file the record within the time prescribed, to docket the cause, and file a copy of the record with the clerk. The defendant in error has only conformed to this rule, and can be liable to no censure for doing so.

The second cause assigned for refusing to issue the execution, has been contested on two grounds: —

1. It is contended that an injunction could not be awarded while the record was before this court on a writ of error.

We do not think this a valid objection. The suit in chancery does not draw into question the judgment and proceedings at law, or claim a right to revise them. It sets up an equity independent of the judgment, which admits the validity of that judgment, [* 564] but suggests reasons why the * party who has obtained it ought not to avail himself of it. It proposes to try a question entirely new, which has not been and could not be litigated at law. It may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal. The bill is an original bill, and may be filed, although an injunction should not be awarded. The injunction arrests proceedings at law, and may be dissolved or continued without making any final decree in the case. The condition of the suit at law may be a reason for imposing terms on the party who applies for an injunction, but can be no reason for refusing it. The subpœna and injunction act on the person to whom they are directed, not on the record, and it can be of no consequence where the record is.

2. The second objection to the pendency of the injunction has more weight. It was awarded in December, 1825, by the district judge, and no order appears to have been made for its continuance at the succeeding term. The act which authorizes the district judges to grant writs of injunction, provides "that the same shall not, unless so ordered by the circuit court, continue longer than to the circuit court next ensuing." An order for its continuance, therefore, ought to have been made; and, after the close of the term without such order, an execution might have been sued on the judgment without any contempt of the court.

But if, in point of law, the injunction ceased to exist, the court could reinstate it at will. The judges acted obviously on the opinion that the injunction still continued and ought to continue. Two successive motions to dissolve it were overruled. The same view of the case, which induced the court thus to continue the injunction, must

have induced a reinstatement of it, had it been supposed to be discontinued by the omission to make an order in it at the term to which the subpœna was returnable. If, upon the ground of this omission, the *mandamus* should be awarded, it might be rendered useless by granting a new injunction. It ought to be granted if the case, as it now appears, shows that the plaintiff in equity is entitled to relief. We must suppose that, in the opinion of the court, he is so entitled, * or the injunction would have been [* 565] dissolved on motion. The continuance of the injunction is, in substance, equivalent to a renewal of it.

Under these circumstances, some difference of opinion exists on the motion for a *mandamus*. Some of the judges think that it ought to be awarded; others are of opinion that as the injunction is still continued by the court, and as the judges, who have a right to give it force, have returned that it is in force, it ought not to be awarded. The motion is overruled. *Rule discharged.*

THOMPSON *v.* PETER and JOHNS, Administrators *de bonis non* of Peter, deceased.

12 W. 565.

A declaration by the personal representatives of the original debtor, deceased, that he had no funds to pay the debts of the testator, will not take the case out of the statute of limitations.

ERROR to the circuit court for the District of Columbia.

Jones, for the plaintiff.

Key, for the defendants.

MARSHALL, C. J., delivered the opinion of the court.

* This was a suit brought in September, 1822, on a prom- [* 567] ise alleged to have been made by the intestate of the defendant, who died in the year 1808. The defendant pleaded *non assumpsit*, and the statute of limitations, on which pleas issue was joined. By consent of parties a verdict was found for the plaintiff, subject to the opinion of the court, whether the evidence which is stated in a case made by the parties, be sufficient to be left to the jury as evidence of a subsequent acknowledgment, competent to take the case out of the statute of limitations. The court gave judgment for the defendants, which judgment is now before this court on a writ of error.

The court is of opinion that the circuit court decided rightly. The original administrator, David Peter, did not acknowledge the debt, but said there were no funds in hand to pay the debts of the testator.

This language might be used by a person not intending to give any validity to the claim, and ignorant of its real merits. The conversation with one of the present defendants, George Peter, was still further from being an acknowledgment. Had this even been a suit against the original debtor, these declarations would not have been sufficient to take the cause out of the statute. The cases cited from 8 C. 72, and 11 W. 209, are expressly in point. But this is not a suit against the original debtor. It is brought against his representative, who may have no personal knowledge of the transaction. Declarations against him have never been held to take the promise of a testator or intestate out of the act. Indeed, the contrary has been held. *Judgment affirmed, with costs.*

Williamson and others, Appellants, *v.* Daniel and others, Respondents.

12 W. 568.

An absolute bequest of certain slaves to P. H. is qualified by a subsequent limitation over, that if either of the testator's grandchildren, P. H. or J. D. A., should die without a lawful heir of their bodies, that the other should heir its estate, which converted the previous estate into an estate tail; and there being no words in the will which restrained the dying without issue to the time of the death of the legatee, the limitation over was held to be on a contingency too remote.

The rule of *partus sequitur ventrem* is universally followed, unless there be something in the terms of the instrument which disposes of the mother, separating the issue from her.

Appeal from the circuit court of Georgia.

The controversy in this cause arose out of the following clauses in the will of James Daniel: "I lend my wife twenty-one negroes," naming them, and also certain lands, "during her natural life." And subsequently: "I give and bequeathe unto my granddaughter, Patsy Hendrick, three negroes, namely: Joe, Parker, and Willis. I also give her one half of the negroes I have lent my wife, to her and her heirs forever. I give and bequeathe unto my grandson, Jesse Daniel Austin, son of Betty Austin, one half of the negroes I have lent my wife, after the death of my wife, Nancy Daniel. Now my will is, that if either of my grandchildren, Patsy Hendrick or Jesse Daniel Austin, should die without a lawful heir of their bodies, that the other should heir its estate. Jesse Daniel Austin, (now called by special act Jesse Austin Daniel,) survived Patsy Hendrick; and after the death of Nancy Daniel, the widow of the testator, took into possession all the negroes bequeathed to her during her life. Patsy Hendrick died about the year 1805, intestate, and without heirs of her body, being at the time of her death an infant about nine years old,

leaving Robert Hendrick, her father, and Louisa Hendrick, her half-sister, by the father's *side, now Louisa Gibbes, [* 569] one of the complainants, her next of kin. Robert Hendrick died in 1814, having first made his will, bequeathing his estate to the said Louisa, his daughter, and his wife Mary, now Mary Williamson, also a complainant. Some of the slaves, to wit, Sally and her children, were born in the lifetime of Nancy Daniel.

The court below determined that the limitation over was too remote, and decreed one half the slaves to the representatives of Patsy Hendrick, the complainants. It is also decreed that the slaves, Sally and her children, did not belong to the estate of the tenant for life. The defendants appealed to this court.

Berrien, for the appellants.

Wilde, for the respondents.

MARSHALL, C. J., delivered the opinion of the court.

The first bequest to Patsy Hendrick would pass the slaves therein mentioned to her absolutely, were not this absolute estate qualified by the subsequent limitation over, if either of the testator's grandchildren, Patsy Hendrick, or Jesse Daniel Austin, should die without a lawful heir of their bodies, that the other should heir its estate. We think these words convert the absolute estate previously given, into an estate tail; and, if so, since slaves are personal property, the limitation over is too remote.

There are no words in the will which restrain the dying without issue to the time of the death of the legatee. The remainder over is to take effect whenever either of the immediate legatees should die without a lawful heir of his or her body. The gift in remainder is a gift of the stock, and is limited over on a contingency too remote to be allowed by the policy of the law.

*The second point is, we believe, well settled. The issue is, [* 570] we believe, universally considered as following the mother, unless they be separated from each other by the terms of the instrument which disposes of the mother. *Decree affirmed, with costs.*

NEWMAN, Plaintiff in Error, *v.* JACKSON, Defendant in Error.

12 W. 570.

No particular form of notice of a sale under a deed of trust is prescribed by law; it is sufficient if the description of the land is reasonably certain, so as to inform the public of the property to be sold.

THIS cause was argued by *Key*, for the plaintiff in error, and by *Swann*, for the defendant in error.

TRIMBLE, J., delivered the opinion of the court.

This was an action of ejectment, brought to recover lot No. 99, in Threlkeld's addition to Georgetown, with the improvements thereon, fronting 60 feet on Fayette street, and 120 feet on Second street.

The plaintiff in error was tenant in possession of the premises, appeared to the action, and, upon entering into the common consent rule, was admitted to defend, and pleaded not guilty, upon which issue was joined.

Upon the trial in the court below the plaintiff gave in evidence a deed from John W. Bronaugh to Thomas G. Moncure, conveying to him in trust, for the payment of certain enumerated creditors: "A lot on Fayette street, and Second street, in Georgetown, fronting 60 feet on Fayette street, and 120 feet on Second street, with the [* 571] buildings, *improvements, and privileges," in trust, to secure the payment of the enumerated debts within thirty days; and, if not then paid, the property conveyed in trust to be sold, "after a week's notice in the Messenger," &c.

The plaintiff gave in evidence the notice published in the Messenger, under and in pursuance of which the property was sold at public auction, in these words, to wit: "By virtue of a deed of trust to the subscriber, for the securing certain moneys therein mentioned, will be exposed to public sale, on Thursday, the 4th of March next, for ready money, the following described property, namely, lot No. 99, in Peter, Beatty, Threlkeld, and Deakins's addition to Georgetown, fronting 60 feet on Fayette street, and 120 feet on Second street, with a two story brick dwelling-house, in excellent repair thereon. The sale to take place on the premises.

"THOMAS G. MONCURE, *Trustee.*

"The above sale postponed until the 4th day of May next, when it will certainly take place. *March* 24, 1819."

The plaintiff proved that the lot conveyed by the deed of trust had been sold on the premises, at public auction, by Moncure, the trustee, on the day mentioned in the notice, and that Jackson became the highest bidder and purchaser; and the plaintiff gave in evidence the deed of conveyance made by the trustee to Jackson, for lot No. 99, &c., in pursuance of the public sale. It was proved that the plaintiff in error had entered upon the premises as tenant to John W. Bronaugh, and that he was in possession at the commencement of the suit; and the town plats were also given in evidence.

A verdict was taken for the plaintiff, subject to the opinion of the court, as to the law arising upon the case, and the court below thereupon gave judgment for the plaintiff in that court.

It is contended for the plaintiff in error that the judgment of the court below is erroneous, and should be reversed:—

*1. Because no valid sale could be made of the premises [* 572] in question without the aid of a court of equity.

2. Because the trustee's "proceedings were irregular, and no title passed to the appellee, by Moncure's deed of the 14th of June, 1819."

We do not think there is any thing in the first ground assumed by the counsel for the plaintiff in error. Whether the conveyance from Bronaugh to Moncure be regarded as a mortgage, as contended for by the counsel, or as a deed of trust, in the usual and technical sense of the term, there can be no doubt it vested in Moncure the legal title to the premises; and his conveyance of the premises by deed to the appellee, if regularly made, must necessarily be regarded in a court of law as investing the appellee with the legal title. How the matter might be regarded by a court of equity is not for this court here to say. But it is perfectly clear that the conveyance of the trustee was a sufficient title at law to enable his alienee to recover in the action of ejectment, unless the second objection is maintainable.

The second ground of argument proceeds upon an objection to the notice of sale. It turns out, upon an inspection of the town plats, that the premises in question do not lie in "Peter, Beatty, Threlkeld, and Deakins's addition to Georgetown," as described in the notice, but in "Threlkeld's" addition to Georgetown. And this mistake in the description of the premises, it is insisted, wholly vitiates the notice, and must render the sale made under it void. We think the objection ought not to be sustained. The law has prescribed no particular form for a notice of this description. It is sufficient if, upon the whole matter, it appears calculated reasonably to apprise the public of the property intended to be sold. We think the notice sufficient for that purpose, notwithstanding the inaccuracy of describing the property as being in "Peter, Beatty, Threlkeld, and Deakins's addition," instead of "Threlkeld's addition." It could not mislead those who did not know the precise limits of these respective additions, and they were, to those who might wish to purchase, of so little consequence as scarcely to form a subject of inquiry. That part of the description, all must have known, did not and could not *point out the particular lot intended to be sold. That [* 573] could only be arrived at by the more certain and specific description of its locality; namely, "lot No. 99, fronting 60 feet on Fayette street, and 120 on Second street." To those who knew

the precise limits of the several additions, the notice furnished, upon its face, not only sufficient evidence of the mistake, but a sufficient corrective of that mistake. They could not be ignorant that Fayette street and Second street were not in the addition described, but in the adjoining addition, in the name of Threlkeld. As the lot is described as fronting 60 feet on one of those streets, and 120 on the other, it must have been obvious, at once, that as these streets crossed each other at right angles, and the lots were laid off in right-angled parallelograms, the lot intended lay in the angle formed by these two streets. The streets of a town are its public highways, and must be presumed to be well known to or easily found by all those who have an interest in knowing them, or inquiring for them. They are, indeed, the most prominent and notorious landmarks and guides by which the lots are to be sought for, found, and known.

It cannot be believed that any one wishing to find or know lot No. 99, fronting 60 feet on Fayette street, and 120 feet on Second street, or to purchase, could be for one moment misguided by the inaccurate and palpably mistaken description of its being in "Peter, Beatty, Threlkeld, and Deakins's addition."

Common sense would dictate to every one who read the notice, that the less important, obscure, and indefinite part of the description which, whether true or false, did not fix and give locality to the lot intended to be described, ought to yield to that palpable and notorious description, in reference to the public streets and highways of the town, which gave it positive locality.

It has been said that the No. 99 did not appear on the recorded plat of the town, upon which the square only is laid down, without divisional lines and numbers designating the lots of each square; but it is admitted it was numbered on the plat made out by order of the corporation, and lodged with the register, but not recorded.

[*574] * It is believed no purchaser would have ventured to buy without first inspecting the title deeds, and both the plats. But be this as it may, and even if any should have been so careless as not to examine the latter plat, still, it would clearly appear from the recorded plat that the lot described did not lie in the addition supposed by the notice, but in Threlkeld's addition, which was all that was necessary to correct the mistake; and it would also appear, it must necessarily lie in the angle made by Fayette street and Second street.

A purchaser or any one inclined to be a purchaser, of property upon those streets, could not have failed to have ascertained the particular lot intended by the notice.

We all think the notice was, notwithstanding the mistake in part of the description, certain to a common and reasonable extent, and that is sufficient. *Judgment affirmed, with costs.*

DUNLAP and another, Appellants, *v.* DUNLAP and others, Respondents.

12 W. 574.

It being a general custom on the sale of entries in a military tract, for the vendee to take his chance of a surplus or deficiency in quantity, the vendor must show a special contract in writing to entitle himself to such surplus.

THIS cause was argued by *Scott*, for the appellants, and by *Doddridge*, for the respondents.

MARSHALL, C. J., delivered the opinion of the court.

*This suit was brought originally by John Dunlap, the [*575] appellee, in the circuit court of the United States, sitting in the district of Ohio, to obtain a conveyance of one moiety of a tract of land in the State of Ohio, which was purchased, as is alleged in the bill, on the joint account of the plaintiff and his uncle Alexander, one of the defendants in the circuit court. Alexander, who made the contract, obtained the conveyance to himself, and afterwards conveyed the land to his son James. Both Alexander and James were made defendants.

Some time about the year 1792 or 1793, Alexander Dunlap purchased from John Fowler an entry of 1,000 acres of land on the Scioto River, in the Virginia military district, at the price of £100 Virginia currency. An agreement was entered into at the time, between the plaintiff and the defendant, Alexander, that this purchase should be made in partnership, the plaintiff says, with himself, the defendant says, with John Dunlap, senior, his father. The testimony, however, proves incontestably that, though the moiety of the purchase-money was paid by the father, it was paid for the plaintiff, whom he always considered as the rightful proprietor of the land. The purchase will, therefore, be treated, as being made on the joint account of the plaintiff and Alexander Dunlap. James Dunlap claims as a volunteer under Alexander, and his title is dependent on that of his father.

The original entry was made the 7th of August, 1787. It was withdrawn and reëntered on the 22d of April, 1796, and this entry was again withdrawn and reëntered on the 25th of July, 1796. The warrant was reëntered on nearly the same land. The changes were such as might probably be caused by a more perfect knowledge of the country; and the last entry, as surveyed on the 20th of Octo-

ber, 1796, contains about 300 acres of surplus land. The plat of the surveyor, however, on which the patent issued, specifies only 1,000 acres. The right to this surplus constitutes the chief subject of controversy between the parties. The plaintiffs contend that the whole entry was purchased, and that in such contracts the whole entry passes to the purchaser. The defendants insist that
[*576] the original contract was * for only 1,000 acres, and that the surplus land belonged to Fowler. That he afterwards purchased this surplus, not on joint account, but for himself. In 1802 he obtained a grant for the whole tract, in his own name, and now claims the whole surplus as his separate property.

The entry is for 1,000 acres of land. The survey made on the entry purports to be for 1,000 acres of land. The plat and certificate of survey were transferred by John Fowler to Alexander Dunlap, by an indorsement in the following words: "I do hereby assign all my right, title, and interest to the within land to Alexander Dunlap, and request a grant may issue accordingly."

This is the only written evidence of the contract, and purports to be a transfer of the whole entry and survey.

The defendant, Alexander, alleges in his answer, that the original contract was "only for 1,000 acres of land," that after the survey he discovered the surplus and mentioned it to Fowler, who said that he had contracted to sell but 1,000 acres, and should require additional compensation for the excess. The respondent agreed to give him $300 for the surplus, and Fowler's receipt for that sum, dated the 17th of October, 1800, is annexed to the answer. Though the defendant introduces into his answer the allegation that he purchased only 1,000 acres of land, yet it is remarkable, that in the first part of the same answer he states himself to have purchased the entry, and also says that the surplus was not discovered until many years afterwards, when the survey was made. The reservation of a surplus, when no surplus existed, in a contract which purported to be made for the entire tract, at a time when the purchase of entries was a common transaction, and the probability that an entry might be so surveyed as to comprehend more land than it called for, or so as to interfere with other entries and lose a part of the land it covered, was a matter of general notoriety, is so extraordinary a circumstance as to justify a critical examination of the testimony by which it is supported.

Alexander Dunlap, in the first instance, states the contract to have been, in fact, what it purports to be, a purchase of the entry,
[*577] that is, of the entire entry. To reconcile this * with the subsequent declaration, that "the purchase was only of

1,000 acres of land," we must suppose that, as the entry called for that quantity, and he purchased the entry, he might allow himself to say that he purchased only 1,000 acres. He drew an inference, however, which the law does not draw, and on which he ought not to have acted until he consulted his partner.

The defendants also sustain their pretensions by the testimony of John Fowler, whose deposition was first taken on the 24th of October, 1817. He identifies the receipt, and swears that it was a fair transaction.

His deposition is taken a second time, on the 3d of August, 1819 He swears "that he sold to Alexander Dunlap 1,000 acres of land, within the bounds of a military survey made in his name, as assignee of Arthur Lind, on the Scioto River, and, afterwards, about the 7th day of October, 1800, he sold to said Alexander Dunlap, for the consideration of $300, all the surplus contained within the bounds of the said military survey."

This deposition states the original contract as if a survey, not an entry, had been the subject of it; and as if the transfer had been of a specified portion of that survey, not of the whole.

On the 18th of November, 1820, a copy of the plat and certificate of survey was obtained from the general land-office, by which it appeared that the survey was made on the 20th of October, 1796, three or four years after the entry had been sold.

The deposition of John Fowler was again taken on the 28th of November, 1822. He swears that in 1792, or 1793, he sold to Alexander Dunlap 1,000 acres, part of a military survey made in the deponent's name, as assignee of Arthur Lind, on the Scioto River, at the rate of ten pounds Virginia currency per 100 acres, reserving the surplus should the said survey contain any within the bounds." Some years afterwards, he was informed by the late General Nathaniel Massie that "the survey contained about 300 acres of surplus." Sometime after which he proposed to sell the said surplus to Alexander Dunlap, who agreed to give him therefor $300.

* In this deposition, the witness states a sale by the acre, [*578] although, in his preceding depositions, he had spoken of a sale in gross. In his second deposition, he had mentioned the sale of 1,000 acres of land, "within the bounds of a military survey made in his name on the Scioto;" plainly alluding to a survey already made. In his third deposition, he still speaks of a military survey, but plainly speaks of it as of one to be made in future. He reserved the surplus, he said, "should the said survey contain any within the bounds." It is also observable that he says he received the information from Massie; whereas, Alexander Dunlap says, in his answer,

that he himself gave the information to Fowler. This, however, taken in itself, would not be a very material contradiction. It might be accounted for. But the various shapes in which Fowler places the contract certainly show that his recollection of it was very imperfect, and is not entitled to much credit.

The assignment which he made to Alexander Dunlap is of the entire survey. It must be considered as an execution of the contract he had previously made; and is written evidence of the extent of that contract. If, instead of selling the whole survey, as the assignment imports, he had sold only a part of it, his natural course would have been, either to take out the patent in his own name and give his obligation to convey a part when the patent should issue, or to take it out in their joint names, entering into an agreement specifying their respective interests, or to take some obligation from Alexander Dunlap, binding him to reconvey the surplus. A written contract cannot be varied by such suspicious testimony as that of Fowler; especially in a case which contains within itself the strongest circumstances of probability against the attempt.

This probability is supported by other testimony than is furnished by the contract itself. James Dunlap, the brother of John, deposes, that Alexander Dunlap told him he and the plaintiff had purchased the tract of land in partnership; language which certainly alludes to the whole tract. The partition, too, which was afterwards made, after an actual survey for the purpose, if it divided the tract [*579] into *moieties, is almost conclusive evidence that the idea of Fowler's title to the surplus had not then occurred to the appellant.

The counsel for the appellant endeavors to support Fowler's title to the surplus independent of the special contract, and cites some cases to show that where land has been sold for a certain quantity, and has, in fact, amounted to much less than the quantity mentioned, a court of equity has interposed and given relief. But the difference is very material between contracts made for land in a settled country where the titles are complete, the boundaries ascertained, and the real quantity either known or within the reach of the vendor, and those made for land situated as was the whole military district at the date of this contract. It was notoriously the general practice to sell an entry or a survey taking the chance of surplus and the hazard of losing a part of the land by other entries. A special contract, departing from this general custom, ought to be in writing, or to be very clearly proved, especially when the written evidence of the contract conforms to this general custom.

It is also worthy of remark that the entry, as it stood when sold,

could not have contained any surplus land. It calls "to begin on the Scioto, at the lower corner of Benjamin Lawson's entry, No. 439, running down the river 1,000 poles when reduced to a straight line, thence from the beginning with Lawson's line so far that a line parallel to the general course of the river shall include the quantity." No excess ought to be anticipated from the survey of such an entry, and the anticipation of such excess is against all probability. The subsequent changes of the location must be supposed to have been made by the owner of the land, and the survey also must have been made by his direction, perhaps through his agent, the locator, or according to the judgment of the surveyor. Nothing could accrue to Fowler from a survey so made.

We are, then, entirely satisfied that the whole tract was purchased, and ought to be divided between the purchasers in equal moieties, unless some partition has been made or agreed upon between them.

It is certain that an effort towards a partition has been
* made, and the questions which grow out of this effort con- [* 580]
stitute the sole difficulty in the case.

The bill charges that before the grant was issued the parties divided the land in equal quantities, and the plaintiff paid Alexander sixty dollars for choice of moieties, and elected to take the northern or upper part. A dividing line was then run, and each party took possession of his land in severalty.

The defendant admits that there was a conversation concerning a division, that the line was partially run, and that the plaintiff paid him sixty dollars for choice; but insists that the line was only partially run, that the division was incomplete, and that the intention was to divide 1,000 acres only.

It is, then, admitted that some division was made, that some line was run, that John paid Alexander sixty dollars for choice, and chose the northern part. If that line can be found, it ought to be established; and if it has been run only a part of the way, it ought to be continued to the outward boundary of the tract. If it cannot be found, the land is now to be divided into moieties in the manner then agreed on.

James and John Stephenson depose that they were the chain carriers when the survey for the purpose of a division was made. That a dividing line was run from the back line towards the river. They both think that a marked line to which they were conducted in the presence of the parties and of James Hough, the surveyor, was the line which was then run. Their opinion is founded on the contiguity of the corner which was shown to them as the beginning to a branch which is near it, and which they think they recollect. The line was

run about twenty years before they gave their depositions, which was in 1818, and they do not know whether the line now shown them is the true line or not.

Other testimony shows that it cannot be the true line. The surveyor proves that the marked tree shown as the beginning had not, in 1821, been marked more than seven or eight years; and [*581] all the testimony in the cause proves that * the line ran through James Dunlap's orchard, and that he himself frequently said so. The line now claimed by him, and supposed by the Stephensons to be the true line, would not come near his orchard. It is apparent, then, that this line has been made long since the division, and there is some reason to suppose it was made by James Dunlap, who occupied Alexander's moiety of the tract.

The place established by the court as the beginning is a white oak and blue oak, standing in the western line of the tract, and marked as a corner. Being in the line, there could be no reason for marking them as a corner unless such had been the fact, and the trees could be a corner only between the Dunlaps. The surveyor cut a block out of the ash, including one of the chops, and found, from marks which are considered as unerring, that the chop had been made twenty-one years; that is, there were twenty-one years' growth over it. This was in December, 1818. The chop might have been made in the autumn of 1797, or the spring of 1798. The dividing line is supposed to have been run in 1798. A line from this point to the river, so as to divide the tract equally, passes through James Dunlap's orchard, and leaves rather more of it on the side of John than would be left by the line which James Dunlap had admitted. This line is established by the decree of the court. The testimony is, we think, in its favor, and that there is no error in the decree. It is affirmed, with costs.

M'Connell v. The Trustees of the own of Lexington.

12 W. 582.

A question in equity as to the title to a lot of land in the town of Lexington, Kentucky, reserved as public property, and claimed as having been appropriated by the plaintiff's ancestor. Bill dismissed under the circumstances of the case.

This cause was argued by *Rowan*, for the plaintiff, and by *Talbot*, for the defendant.

Marshall, C. J., delivered the opinion of the court.

This suit was brought in the court of the United States for the seventh circuit and district of Kentucky, against the trustees of the town of Lexington and others, to obtain a conveyance of in and out

lots, No. 43, in that town, or of such other lots in lieu of them as might still remain to be conveyed by the trustees. The whole of out lot, No. 43, and a part of the in lot had been conveyed to other persons, who had been in possession for such a length of time as to bar the plaintiff's action. The bill was, therefore, dismissed by the plaintiff as against those defendants, and continued against the trustees.

The commonwealth of Virginia had, in 1773, by an act commonly called "the land law," reserved 640 acres of land for the benefit of those who had settled in a village or station, that it might be afterwards laid out into lots for a town and divided among such settlers. The inhabitants of Lexington purchased 70 acres adjoining the reserve of 640 acres, and, after laying the whole off in lots and streets, petitioned the assembly to establish a town. The legislature, in May, 1782, passed an act vesting the whole 710 acres in trustees, who were empowered to make conveyances to those persons who had already settled on the said lots, as also to the purchasers of lots theretofore sold; and to lay off *such other parts of [*583] the said land as was not then laid off and settled into lots and streets, and to sell or otherwise dispose of the same, for the benefit of the inhabitants.

James M'Connell was one of the settlers in Lexington, and was killed by the Indians, in 1782. His brother and heir at law, Alexander M'Connell, filed this bill in 1815, and founds his claim on proof that he had in his lifetime erected a tannery on in lot No. 43, on which was a large spring; and on the following order of the board of trustees: —

"At a meeting of the board of trustees for the town of Lexington, September 30, 1782, No. 43 in and out lot granted to James M'Connell, to be appraised, and the valuation thereof redound to the heirs of said M'Connell, deceased."

The trustees, in their answer, insist that in lot No. 43 never was granted to James M'Connell, but a part of it has always been considered as reserved, on account of a spring upon it for the use of the inhabitants. They are informed by the old settlers that the privilege of establishing a tannery on that lot was, in the year 1781, granted to James M'Connell, who did establish one, and that the order of appraisement was intended to cause a valuation of the improvements and of the leather in the tannery, not of the lot itself; and that so much of the entry as applies to the lot itself is a mistake of the clerk. They say that other lots, not these, were granted to M'Connell. They also insist on the length of time which has elapsed, and on the statute of limitations.

Several certificates from the clerk, and extracts from the record

books of the trustees, are filed as exhibits in the cause. From one of these certificates it appears that, on the 20th of December, 1781, at the first arrangement of in and out lots of the town of Lexington, among the settlers, in lot No. 18, and out lot No. 37, were granted to James M'Connell as his donation lots. The out lot appears to have been transferred by John Clarke, whose connection with M'Connell is not stated, to Robert Parker, to whose assignee a conveyance was made by the trustees, in August, 1785.

An assignment by Alexander M'Connell, as heir at law of James, of his title to an out lot in the town of Lexington, made in
[*584] May, 1795, is produced; but this assignment neither * mentions the number of the lot, nor the name of the assignee.

Another certificate from the clerk states that in lot No. 18 was granted on the 26th of March, 1781, to William Stule, and afterward, on the 20th of December, 1781, to Benjamin Hayden. It was afterwards, on the 1st of July, 1783, awarded to James M'Connell, and afterwards, on the 8th of March, 1785, was forfeited. The cause of forfeiture is not mentioned. The presumption is that it must have been on account of the non-performance of some condition on which the allotment was made.

The entries of the orders made by the trustees seem to be in great confusion. This may be well accounted for by the then situation of that country. Some time in the year 1784 or 1785, Robert Parker, then clerk of the board of trustees, was ordered to transcribe their old books. Many of their entries were made on small scraps of paper and on backs of old letters. The book then made out is said to be lost. There is, however, a book of records.

The imperfect and confused state of the books has made it necessary to resort to the testimony of witnesses to supply facts which the books do not disclose.

It is very well ascertained that the large spring, below which M'Connell's tanvats were sunk, was inclosed within the stockade, and was used by the inhabitants of the fort generally. It is also in proof that the settlers were each entitled to an in and out lot, and that the trustees frequently allowed those who were dissatisfied with the lots which they drew, to exchange them for others not previously granted.

William Stule, who was one of the original trustees, deposes that the lot on which the tanvats were sunk in spring, 1782, was called M'Connell's lot, but he does not recollect any contract between M'Connell and the trustees, or any disposition made by them of the lot, until a part of it was given to Bradford, on which to erect a printing office.

Robert Patterson was also one of the original trustees, and was a friend and relation of M'Connell. He deposes that M'Connell was a tanner; the trustees being desirous to attract tradesmen to the station, permitted M'Connell to erect a tanyard on the lot in contest, about the fall, 1781. That the deponent was authorized by the trustees, about the year *1783 or 1784, to clear out and [*585] wall up the public spring, for which he was paid by them. That it was called and used as the public spring from the first settlement of the town. He believes M'Connell was permitted to use part of the lot as a tannery, for the people of the town, because it was more convenient and under cover of the fort. While thus used, it was called M'Connell's tanyard. He does not know that the trustees intended to make any other grant of the lot than to suffer its use by M'Connell. They fixed a market-house on the lot, in 1790 or 1791, and then claimed it as their own property. They granted part of it in the year 1787 to John Bradford, on condition of his establishing a printing-office on it, reserving the public spring and a considerable front on Main and Water streets, on which they erected buildings which were rented to Bradford. They reserved a number of lots for public use.

John Torrence, William Martin, Samuel Martin, Benjamin Hayden, Joseph Mitchell, Josiah Collins, and Hugh Thompson, were among the early settlers of Lexington, and were examined, some of them by the appellant, and some by the trustees. They all concur in the declarations that the spring was public, for the use of the people of the fort generally; that it was called the public spring; some, that it was called the public spring lot; that M'Connell sunk vats, and constructed a tanyard on it, after which it was called M'Connell's tanyard, and one witness is inclined to think, M'Connell's lot. They all concur, however, in denying having ever heard that the lot was given to M'Connell, or to any other person. Some say, though they never heard him claim the lot, they have heard him claim the tanyard. Joseph Mitchell swears that M'Connell claimed a lot in a different square. Hugh Thompson says that the records of the trustees, which are produced to him at the time his deposition is taken, plainly show that in lot No. 18 and out lot No. 38, were granted to James M'Connell. John Parker and Alexander Parker came to Lexington, the one in 1783 and the other in 1784. They were each of them members of the board of trustees, and depose to the universal understanding that the spring lot was reserved for public use, and had never been granted to any person, until a part of it was granted to *Bradford, for a printing-office. [*586] Alexander Parker says that, on looking into the record

books, while a trustee, he saw, with surprise, the entry under which Alexander M'Connell claims; and on making inquiries from Col. Robert Patterson, also a trustee, was informed that the trustees had prevailed on James M'Connell to establish a tannery, under cover of the fort, to tan buffalo hides, and had, after his death, appointed appraisers to value his property. That the entry appears in its present form, is the mistake of the clerk who made it. He adds that the records show, that in lot No. 18 and out lot No. 38, were granted to James M'Connell.

The entry under which the appellant claims lot No. 43, does not purport to grant him that lot, but directs a valuation in terms which import a former grant. No trace of that former grant is, however, found, and the testimony is very strong to prove it was never made. The reasonableness of reserving a public spring for public use; the concurrent opinion of all the settlers that it was so reserved; the universal admission of all, that it was never understood that the spring lot was drawn by any person; the early appropriation of it to public purposes; the fact that James M'Connell actually claimed a different lot, added to the length of time which has been permitted to elapse without any assertion of title to this lot, are, we think, decisive against the appellant. There was no error in dismissing the plaintiff's bill, and the decree is affirmed, with costs.

6 P. 431; 12 P. 410, 657; 7 H. 185; 9 H. 10.

Chotard and others *v.* Pope and another.

12 W. 586.

An authority "to enter" a certain quantity of land does not authorize a location on lands previously appropriated, or withdrawn from the lands offered for sale.

[* 587] This cause was argued by *Livingston* and *Webster*, for the plaintiffs, and by the *Attorney-General* and *Sampson*, for the defendants.

Johnson, J., delivered the opinion of the court.

The rights of the complainants in the land in litigation in this cause, depend upon the construction of the act of congress of May 8, 1820,[1] passed for the relief of the legal representatives of Henry Willis. The words of that act under which the complainants suppose themselves entitled to relief, are these: "That the legal representatives of Henry Willis be and they are hereby authorized to enter, without payment, in lieu, &c., in any land-office, &c., in the States of Mississippi or Alabama, &c., a quantity of land not exceed-

[1] 6 Stats. at Large, 246.

ing thirteen hundred acres, &c." Under the operation of these words, assuming the right to appropriate any unpatented land in the two States, the complainants have asserted the privilege of entering a tract of land which covers the site surveyed and laid off for the town of Claiborne, in the State of Alabama. The proper officers have refused to issue the ordinary evidences of title, and have gone on to sell out the town lots according to law. This bill is filed against the register of the land-office, and the purchaser of one of the town lots, to compel them to make titles to complainants.

On behalf of the United States, it is contended that the literal meaning of the terms of the act is limited and restrained by the context, and by considerations arising out of the general system of land laws of the United States, into which this act is ingrafted; and that, so construed, the right granted is limited to that description of lands which are liable to be taken up at private sale.

And such is the opinion of this court. That the legislature had distinctly in view its general provisions for disposing of the unappropriated lands of the United States, is distinctly shown in every line of the act under consideration. First, the party is referred to the land-office to make his entry; he is then confined *to [*588] the locations designated by the surveys made by the United States. After which it goes on to enact that "the register or registers of the land-offices aforesaid shall issue the necessary certificate or certificates, on the return of which to the general land-office, a patent or patents shall issue." Here the whole organization of the land-office is brought into review; and if then the term "enter" can be shown to be restricted and confined in its application to a particular class or description of lands, it will follow that when used in laws relating to the appropriation of lands, it must lose its general and original signification, and be confined to what may be called its technical or legislative meaning.

The term entry, as applied to appropriations of land, was probably borrowed from the State of Virginia, in which we find it used in that sense at a very remote period. Many cases will be found in the reports of the decisions of this court, in which the titles to western lands were drawn in question, which will show how familiarly and generally the term is used by court and bar. Its sense, in the legal nomenclature of this country, is now as fixed and definite as that of many terms borrowed from the common law. It means, that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several States by the epithet of an entry-taker, and corresponding very much in his functions

with the registers of land-offices, under the acts of the United States. In the natural progress of language, the term has been introduced into the laws of the United States; and, by reference to those laws, we think the meaning of the term will be found to be distinctly confined to the appropriation of lands under the laws of the United States, at private sale.

It is familiarly known that the public lands are uniformly brought into market in pursuance of a system which commenced in the year 1796, and was perfected about the year 1800. The lands are first surveyed, then advertised at public auction, and then, whatever remains unsold at public auction, is offered at private sale to the first applicant, at stipulated prices. The act of 1800 presents a full view of the course pursued on this subject, and the 7th[1] [* 589] section (vol. * 3, p. 388) of that act distinctly shows that the right to enter lands is confined to those lands which are offered at private sale. The words enter, entry, and book of entries, will be found in that section, all used, and exclusively used, with reference to the appropriation of lands of that description. Now, no one ever imagined that, under the general system, the right of appropriation by entry in the register's office, extended to any appropriated lands, however those appropriations were legally made. The ideas on this subject were so fixed in familiar use, that congress felt no necessity for further precaution in legislating on this subject in this instance, than what is implied in the use of language belonging to their general system.

By looking through the laws making provisions for grants of land, from the year 1800 downwards, congress will be found repeatedly using the term entry in a sense which leaves no doubt of the description of lands to which it is applied. In the act of the 3d March, 1817,[2] (vol. 6, p. 286,) entitled an act allowing further time for entering donation rights to lands in the district of Detroit, it will be found by comparing the title with the enacting clause, that the sense in which the term entry is used, is that of filing a claim with the register of the land-office. But all the previous laws on the subject show that the only lands that could be appropriated by filing a claim in the register's office, were those which were offered at private sale. In the act of March, 1818,[3] (vol. 6, p. 260,) for "authorizing certain purchasers of public lands to withdraw their entries, and transfer the moneys paid thereon," we find congress familiarly using the term with reference to the same subject; and still more explicitly in the act of March, 1819,[4] entitled an act providing for the correction of errors in making entries of lands at the land-offices, (vol. 6, p. 427,) until

[1] 2 Stats. at Large, 75. [2] 3 Ib. 390. [3] 6 Ib. 200. [4] 3 Ib. 526.

finally, in the year 1820, the very legislature which passed this act in favor of the heirs of Willis, has furnished such explicit evidence of the meaning which they attach to the grant of a right to enter, as banishes every doubt.

In the 2d and 3d sections of the act of April 24, 1820,[1] (vol. 6, p. 486,) entitled, "an act making further provisions for the sale of public lands," will be found conclusive *evidence, [*590] that the right to enter is identified with the right to purchase at private sale, and confined to the appropriating of such lands as may be legally appropriated by entry at the register's office; from which are excluded all lands previously appropriated, whether by public sale, or by being withdrawn from the mass of lands offered for sale.

From the earliest date of the legislation of congress on this subject, there have been appropriations to the public use, made by withdrawing from this mass certain portions of territory for public seminaries, towns, salt springs, mines, and other objects; and the particular land in controversy was appropriated under a previous law, to wit, the act of April, 1820, for the site of a town. We therefore think that it was not included in the right to appropriate vested in the complainants under the act on which they rely.

Before dismissing this subject, it may be proper to remark that the question considered is the only question that was made in argument. The court have also under consideration some points arising on the form of the remedy, and the state of the complainant's right; on which subjects the court are to be considered as uncommitted by any inference that may be drawn from their having disposed of the cause upon the principal question. *Decree affirmed, with costs.*

MASON and another, Plaintiffs in Error, *v.* MATILDA and others, Defendants in Error.

12 W. 590

Under the statute of Virginia, emancipating slaves brought into that State, unless the owner removing with them should take a certain oath within sixty days after such removal, the fact of the oath having been taken may be presumed by the lapse of twenty years, accompanied with possession.

THIS cause was argued by *Sampson* and *Lear*, for the plaintiffs in error, and *Jones* and *Key*, for the defendants in error.

*JOHNSON, J., delivered the opinion of the court. [*591]

This cause comes up on a bill of exceptions from the

[1] 3 Stats. at Large, 566.

court held for Washington county, District of Columbia, in which Matilda, a negress, brought stit in behalf of herself and her three children, to receive their freedom.

The material facts in the cause are these: "One James Craik, through whom the plaintiffs in this court make title, some time in the year 1792, brought Matilda from the State of Maryland into Fairfax county in Virginia, and there settled and resided until his death, in all about two and twenty years.

During this time the three children of Matilda were born, and the whole continued to be held by him in slavery during his life, and at his death were bequeathed to his wife, who bequeathed them to the wives of Moer and Mason.

The whole time which elapsed, from the bringing of Matilda into Virginia to the commencement of this suit, was thirty years.

By the laws of Virginia, a slave brought into that State in 1792, became free after the lapse of one year; but to the act on this subject is subjoined a proviso, that it shall not extend to "those who may be inclined to remove from any of the United States, and become citizens of this State, if within sixty days after such removal he or she shall take the following oath before some justice of the peace of the commonwealth," and then the oath is set out *in extenso.*

On the trial, the defendants below could not produce positive testimony that the oath had been taken according to law; but after proving that the magistrates of the county at the time of Matilda's removal, were all dead, and the continued possession of the family from that time to the institution of the suit, they contended that the cause should go to the jury, under a charge that, from the circumstances so given in evidence, the jury might presume that the oath had been taken in the prescribed time.

[*592] *This the court refused, and charged the jury in terms purporting the contrary doctrine, upon which the jury found a verdict for the plaintiffs below.

In the argument, two questions have been examined. 1. Whether such a presumption might legally be raised from length of time and circumstances. 2. Whether it could be raised, as against the children of Matilda, who during the greatest part of the time, had been in a state of infancy.

It is a relief to us to find that there has been an express adjudication on both these points. The case arises under a Virginia statute, and in the court of appeals in that State, it appears that both questions arose in the case of Abraham *v.* Matthews, 6 Mum. 159, and were decided in favor of the master of the slave. The court in that case decides that the fact of having taken the oath required, and in

the time required, may be presumed after a lapse of twenty years, accompanied with possession. The language of the court is, "that it may be presumed so as to throw the *onus probandi* on the opposite party;" and this has been considered in argument as an absurdity. In its literal sense it is an absurdity, but in the sense of the court it is far otherwise; it can only mean that the presumption must be repelled by conflicting evidence, or the jury may legally found their verdict upon it.

The infancy of Abraham was also insisted upon in that case, as a circumstance to repel the presumption, but overruled. And that case was a stronger one, on the effect of infancy, than the present; for here the rule *partus sequitur ventram* must take effect. The three children of Matilda claim their freedom on the supposed emancipation of their mother; but their mother did not and could not set up the circumstance of infancy in herself.

It has been supposed that the case of Garnett *v.* Sam and Phillis, 5 Mum. 542, decided in the same court, the year before that of Abraham, conflicts with the latter, and leaves the law unsettled.

If there was such conflict, it is obvious that the latter decision is the superior authority; yet we admit that such incongruity, if it existed, would sanction this court in hesitating on the question whether the law was settled.

*But there is no inconsistency between the two cases; [*593] the same principle is admitted in the first, and asserted in the last.

The instruction moved for in the case of Sam and Phillis was, "that the master, in order to entitle himself to the benefit of the proviso, must show that he had taken the oath prescribed and required by law."

Now, although upon the face of it this would seem to import positive proof, yet the court take a different view of its meaning; for they observe, "that the right of freedom *primâ facie* acquired, could only be obviated by evidence adduced to show, or by circumstances authorizing a presumption that such an oath had been taken, and that the terms of the instruction asked, in that case, were broad enough to include the latter description of evidence as well as the former."

This contains a distinct admission that the master is not restricted to positive proof, and that a presumption of the material fact, that of the oath, resulting from circumstances, may be equivalent to positive proof.

It has been argued that this presumption should be repelled by the ignorance, impotence, and continued state of duress in which the plaintiffs below must necessarily have continued from their state of

bondage. But this also must have been duly considered by the learned judges of the Virginia bench, since the fact equally existed in the cases which were before them.

Practically, we know that they seldom want counsellors or aid of any kind, and that the leaning of courts and juries is very much in their favor. Where any reasonable grounds can be laid hold of to sustain a verdict in their behalf, there is reason to believe that, on questions of right, considerations of every kind in favor of freedom will always have, at least, their full weight. On the other hand, the natural repugnance of man at remaining in that state, is a consideration of great weight in sustaining the presumption from lapse of time.

We think, therefore, that both the points made in argu-
[*594] ment have been decided. We are also satisfied that *the decisions of the court are in perfect analogy with general principles, in the application of prescription and presumptions from length of time, and continued acquiescence of the party whose rights are implicated.

We do not deem it necessary to corroborate the Virginia decisions by comparing them with the authorities on this subject, as we are in the habit of regarding with the highest respect the decisions of the state courts upon causes arising under their own statutes. But any one desirous of pursuing the inquiry, will find the law on this subject very well collected and digested in Mr. Starkie's 3d vol. of his Treatise on Evidence, and the 1225th page of Mr. Metcalf's edition.

Judgment reversed, and a *venire facias de novo* awarded.

Lidderdale's Executors *v.* The Executor of Robinson.

12 W. 594.

Under the statute of Virginia, giving to debts due on protested bills of exchange, the rank of judgment debts, a joint indorser, who has paid more than his proportion of the debt, has a right to satisfaction out of the assets of his co-indorser, with the priority of a judgment creditor.

This cause was argued by *Powell*, for the plaintiffs, no counsel appearing for the defendants.

Johnson, J., delivered the opinion of the court.

The question to be decided in this cause is certified to this court on a division of opinion from the judges of the Virginia district.

[*595] *The bill is filed to recover a sum of money of Robinson's estate; and the debts being numerous, and the assets prob-

ably insufficient to satisfy the whole, the right of priority becomes a material object among the creditors.

The particular demand upon which this question is certified, is that of one Smith, who was joint indorser with Robinson, on a bill of exchange drawn by one Roots, and returned under protest. The bill, of course, must have been drawn payable to Robinson and Smith, and being taken up by them, and the latter having paid more than a moiety in satisfaction of the debt, his administrator now claims of the estate of Robinson the amount by which Smith's payments exceeded the moiety.

There is no question on his right to come in for that sum as a simple contract creditor; but he claims precedence, and the rank of a judgment creditor, under a particular provision of the laws of Virginia in force at Robinson's death, and under an equitable principle, according to which he who pays a debt of a superior dignity is suffered to rank in the application of assets according to the dignity of the debt satisfied; or, in other words, is substituted for the creditor who held the prior debt.

The terms of the Virginia act are these: "All bills of exchange which are or shall be protested, shall, after the death of the drawer or indorser thereof, be accounted of equal dignity with a judgment; and the executors or administrators of every such drawer or indorser, shall suffer judgment to pass against them for all debts due upon protested bills of exchange, before any bond, bill, or other debt of equal or inferior dignity, under the penalty of being obliged to pay the same out of their own proper goods."

The priority, therefore, of the holder of the bill of exchange, as well against the estates of the indorsers, as the drawer, is unquestionable; but the other creditors insist that, as between the co-indorsers, the rights of Smith against the estate of Robinson must be determined by the nature of the action to which he would have been put at law to recover back what he paid above his moiety, that is, *assumpsit* on simple contract. But both on principle and authority we are induced to think otherwise.

*What have the creditors of Robinson to complain of? [*596] They are only referred back to the situation in which they were before they were relieved by the application of Smith's funds to the payment of the bill of exchange. If the bill of exchange still remained in the hands of the holder unsatisfied, his right to a priority from Robinson's estate, as to the moiety of the bill, would be unquestionable; and if relieved from that state by the money of Smith, it is but right that Smith should have refunded to him that sum which they, without that payment, would certainly have been obliged to re-

linquish. This is in perfect analogy with that class of cases in which real assets have been decreed to make good to simple contract creditors sums that have been taken from personal assets, and applied to relieve the real estate, 8 Vesey, 382, or to satisfy specialty creditors, Gibbs *v.* Ougier, 12 Vesey, 413.

That a surety who discharges the debt of the principal shall, in general, succeed to the rights of the creditor, as well direct as incidental, is strongly exemplified in those cases in which the surety is permitted to succeed to those rights, even against bail, who are themselves, in many respects, regarded as sureties. 2 Vern. 608; 11 Vesey, 22. That such would be the effect of an actual assignment made by the creditor to the surety, or to some third person for his benefit, no one can doubt. But in the cases last cited, we find the court of equity lending its aid to compel the creditor to assign the cause of action, and thus to make an actual substitution of the sureties, so as to perfect their claim at law. This fully affirms the right to succeed to the legal standing of their principal; and, after establishing that principle, it is going but one step further to consider that as done which the surety has a right to have done in his favor, and thus to sustain the substitution without an actual assignment. And accordingly we find the *dictum* expressed in Robinson *v.* Wilson, 2 Madd. 434, in pretty general terms, "that a surety who pays off a specialty debt shall be considered as a creditor by specialty of his principal."

If the parties in this cause be considered as claiming un-
[*597] der assignment from the holder of the bill, and each as * assignee of the claim against his co-indorsee, according to the actual state of their respective interests, there can be no doubt of the priority here claimed. This subject has undergone a very serious examination in the courts of the United States, and in cases in which, as in this, satisfaction had been made by the surety without taking an actual assignment of the debt.

The first in order of time was that of Burrows and Brown *v.* M'Whann and Campbell, Administrators of Carnes, 1 Desaussure, 409. This was a case exactly the parallel of the present in all its circumstances. The parties were co-securities to one Banks, in a bond to Warrington, and had all contributed, but unequally, to the satisfaction of the judgment obtained against them jointly on the bond. They had taken no assignment of the judgment, and Brown and Burrows, who had paid most, prayed to be let in as judgment creditors of Carnes, their co-obligor, in right of the judgment obtained by the creditor, Warrington. There was, in this case, satisfaction also entered formally on the judgment, but as this was obtained by

the management of Carnes's administrators, it was treated as a nullity, and the complainants had a priority decreed to them in right of the judgment against themselves, conjointly with Carnes, their co-obligor.

The next case was that of Eppes *et al.*, Executors of Wayles, *v.* Randolph, 2 Call. 125, in which the surety to a bond, having paid it off, but having taken no assignment from the creditor, filed his bill to charge the real estate of the principal, upon the ground that he had succeeded to the rights of the creditor by the mere act of satisfying the bond. It was not questioned that such would have been the effect of an assignment, nor that the aid of the court would have been granted to compel the creditor to assign; but the claim to relief was insisted upon on the ground that, without such assignment, the surety could only be considered in the rank of a simple contract creditor, and, as such, neither having a preference to other simple contract creditors, nor the rights of a creditor by specialty, to charge the assets descended.

This is precisely the defence set up in the present case; but in the case of Wayles *v.* Randolph, the court decided that the surety succeeded to the rights of the creditor, and *decreed [*598] satisfaction accordingly out of the remaining assets, both real and personal; (p. 189;) modifying their decree, however, so as not to affect the executor with a *devastavit* for any payment made before the filing of the bill.

In the year 1802, the same point was decided in the courts of Virginia, in the case of Tinsley *v.* Anderson, 3 Call. 329. In this case, a creditor filed his bill to compel mortgagees and judgment creditors to subject the estate of one Anderson to a sale, that prior incumbrances might be cleared away, so as to let him in for satisfaction; and in applying the proceeds of the mortgaged property, the court was called upon to decide this question in all its latitude. In delivering their decree, the language of the court is, "that for all sums paid by sureties they ought to be placed in the situation of the creditors whose debts they have paid or are bound to pay."

That this, then, is the settled law of the State in which this contract and this cause originated, cannot be doubted. But we feel no inclination to place our decision upon that restricted ground, since we are well satisfied with its correctness on a general principle, and on authorities of great respectability in other States.

We will, therefore, order it to be certified to the circuit court of Virginia district, that John Smith, executor of John Smith, deceased, is entitled to satisfaction from the assets of the estate of John Robinson, with the priority of a judgment creditor of the deceased.

Certificate, accordingly.

De La Croix v. Chamberlain.

12 W. 599.

A warrant or order of survey of lands made by the Spanish authorities at Mobile, in the year 1806, did not confer a complete legal title.

This cause was argued by *E. Livingston*, for the plaintiff, and by *Owen* for the defendant.

Trimble, J., delivered the opinion of the court.

This was an action of ejectment brought by the plaintiff in error against the defendant, in the district court of the United States for the district of Alabama. The plaintiff excepted to certain opinions of the court given in the progress of the trial, and his exceptions having been signed and sealed by the judge, a verdict and judgment was rendered against him; which judgment and exceptions are brought before the court by writ of error.

The questions in the case arise entirely out of the bill of exceptions. It states that "the plaintiff claimed the land in the declaration mentioned, as devisee of the late Francis Collell, and offered in evidence, as the first link in the chain of his title, a concession from the Spanish government to the said Francis Collell, a copy of which is annexed to the bill of exceptions. The court decided that the concession offered in evidence by the plaintiff, being no higher evidence of title than a warrant or order of survey, would not support an ejectment. The plaintiff offered no other title than that above mentioned in evidence. The court decided, also, that the signature of the granting officer of the Spanish government, (the intendant, as well as the assisting officers,) must be proved." These are the opinions excepted to by the plaintiff. A history of the case, somewhat different, is given by the clerk in the transcript of the record sent up.

But it was no part of his duty, nor had he authority, as [*600] clerk, *to state upon the record what was offered in evidence on the trials, or what opinions were expressed by the court in relation to the evidence, otherwise than as stated in the bill of exceptions itself. The evidence given on the trial of an issue at common law is no part of the record, unless made a part of it by bill of exceptions, demurrer to evidence, or case agreed by parties, and entered of record. Nor are the opinions of the court, given incidentally, in the progress of the trial, except so made by bill of exceptions, any part of the record. The statements of the clerk, so far as they are contrary to the statements verified by the seal of the judge, must be wholly disregarded.

The concession referred to in the bill of exceptions is, upon its face,

not a grant nor a survey, but it is, as is expressed in the bill of exceptions, only a warrant, or order, authorizing the deputy surveyor to make a survey, and to report the survey when made, to the intendant, in order to found a grant upon it. The order of survey bears date the day of 1806. At that date, the Spanish authorities were in the actual possession of Mobile, where the land lies; and they claimed it as part of the Floridas, then belonging to the Spanish crown. The United States claimed it as part of Louisiana. But it is not necessary to investigate these conflicting claims. The United States have since obtained the Floridas, by purchase and cession from Spain, without having previously settled the controverted boundary between the Floridas, as claimed by Spain, and Louisiana, as claimed by the United States.

A question of disputed boundary between two sovereign independent nations, is, indeed, much more properly a subject for diplomatic discussion, and of treaty, than of judicial investigation. If the United States and Spain had settled this dispute by treaty, before the United States extinguished the claim of Spain to the Floridas, the boundary fixed by such treaty would have concluded all parties. But as that was not done, the United States have never, so far as we can discover, distinguished between the concessions of land made by the Spanish authorities within the disputed territory, whilst Spain was in the actual possession of it, from concessions of a similar character made by Spain within the * acknowledged limits. We [*601] will not, therefore, raise any question upon the ground of the want of authority in the intendant to make the concession. No question of that sort seems to have been made in the court below. Assuming, then, the authority of the Spanish intendant to make the concession and warrant of survey, the question made and decided in the district court fairly arises, was it a sufficient title to recover upon in the action of ejectment? If the concession had been made in a country where, at the time, the principles and practices known to the common law prevailed, it would not bear a contest. It would be regarded, at most, as an incipient, inchoate right, but not a perfect legal estate. It would not be such title as would maintain an action of ejectment.

Was it a perfect legal estate, was it title, according to the Spanish law, which prevailed at Mobile at the time it was made? We apprehend not. It shows, upon its face, that other acts of sovereignty remained to be done to perfect the title, and which the sovereign power might withhold. A survey was to be made, and, according to the laws and usages of Spain, a formal grant was to be made, in such cases, to complete the title.

It may be admitted that the United States were bound in good faith, by the terms of the treaty of cession[1] by which they acquired the Floridas, to confirm such concessions as had been made by warrants of survey; yet it would not follow that the legal title would be perfected until confirmation. The government of the United States has, throughout, acted upon a different principle in relation to these inchoate rights, in all its acquisitions of territory, whether from Spain or France. Whilst the government has admitted its obligation to confirm such inchoate rights or concessions as had been fairly made, it has maintained that the legal title remained in the United States, until, by some act of confirmation, it was passed, or relinquished to the claimants. It has maintained its right to prescribe the forms and manner of proceeding, in order to obtain a confirmation, and its right to establish tribunals to investigate and pronounce upon their fairness and validity. This is demonstrated by [*602] *the laws which congress have repeatedly passed establishing boards of commissioners to investigate these claims, and to reject or confirm them, or report them to congress in cases of doubt; and by the acts of congress requiring all such claims to be recorded within prescribed periods. It does not appear that this order of survey has ever been recorded or passed upon by the board of commissioners, or register of the land-office, established by congress in the district in which the land lies. It can therefore derive no aid from the laws of the United States.

A law of Alabama was mentioned in the argument, as having some bearing on the case. That law provides, "that all certificates issued in pursuance of any act of congress, by any of the boards of commissioners, register of the land-office, &c., upon any warrant or order of survey, &c., for any lands, &c., shall be taken and received as vesting a full, complete, and legal title, &c., so far as to enable the holder of such certificate to maintain any action," &c. This case is not brought within the provisions of this law; for it does not appear that any such certificate had been issued thereon.

It was insisted by the plaintiff's counsel, that, admitting the order of survey was not in itself title, still, the judgment ought to be reversed, because, as the bill of exceptions states, "that the plaintiff offered the order of survey in evidence as the first link in his chain of title;" the opinion of the court precluded him from offering other evidence of title—as, for example, a survey or grant founded on the order of survey. This argument proceeds upon a mistake. The expressions in the bill of exceptions, that he offered the order of survey "as the first link in the chain of his title," do not import, as the

[1] 8 Stats. at Large, 252.

argument supposes, that he had or might have a survey or grant to offer, in addition to the warrant of survey. The words refer to the statement, that the plaintiff claimed as devisee of Mr. Collell, and mean, that after offering Collell's title or the warrant of survey granted to Collell, as the first link in the chain of his (the plaintiff's) title, he intended to go on and complete the chain from that first link, by proof to establish the second link, namely, his title as devisee. This is evident from what is afterwards stated, [*603] that he offered "no other title than the order of survey."

Again; the court does not reject the order of survey, and exclude it altogether as evidence; but assuming that the paper offered is evidence of the party being proprietor of the order of survey, the court decided that such order of survey was not title to recover on in the action of ejectment. It was a decision, not upon the admissibility of the order of survey as evidence, but upon its legal effect when admitted.

It is not easy to comprehend the object of the latter statement in the bill of exceptions, "that the court decided the signatures, &c., ought to be proved." It does not say they were not proved. It does not state that the paper was rejected because the signatures were not proved. But if the bill of exceptions had so stated, we think the exception on that ground could not be maintained. The warrant of survey does not appear to have been recorded; it purported to be the act of foreign officers, and was not verified by the great seal of the nation to which they belonged, or any other authoritative official seal, which was either known, or could be proved. The court and jury could not be presumed cognizant of their signatures. How, then, could the genuineness and authenticity of the document be proved, otherwise than by proof of the signatures of the officers by whom it purported to be made? It was not of that class of public instruments which prove themselves, and, consequently, it ought to be proved in the mode ordinary instruments are required to be verified by the rules of evidence. *Judgment affirmed, with costs.*

6 P. 763; 12 P. 410, 657; 14 P. 353.

DAVIDSON and another, Plaintiffs in Error, *v.* TAYLOR, Defendant in Error.

12 W. 604.

The bail is fixed by the death of the principal after the return of the *ca. sa.* and before the return of the *scire facias*; and the bail is not entitled to an *exoneretur* in such a case.

THIS cause was argued by *Jones*, for the plaintiffs in error, and by *Coxe*, for the defendant in error.

MARSHALL, C. J., delivered the opinion of the court.

This is a case of bail, and is to be decided by the principles of English law, which the case finds constitute also the law and practice of Maryland on the subject. According to these principles, the allowance of the bail to surrender the principal after the return of a *ca. sa.* is considered as a matter of favor and indulgence, and not of right, and is regulated by the acknowledged practice of the court. To many purposes, the bail is considered as fixed by the return of the *ca. sa.* But the courts allow the bail to surrender the principal within a limited period after the return of the *scire facias* against them, as matter of favor, and not as matter pleadable in bar. In certain cases even a formal surrender has not been required, where the principal was still living, and capable of being surrendered, and an *exoneretur* would be entered, and the principal discharged immediately upon the surrender. But the rule has never been applied to cases where the principal dies before the return of the *scire facias.* In such a case, the bail is considered as fixed by the return of the *ca. sa.*, and his death afterwards, and before the return of the *scire facias*, does not entitle the bail to an *exoneretur.* The plea is, therefore, bad; and the judgment is affirmed, with six *per centum*, damages, and costs.

9 P. 329.

SCOTT and others, Appellants, *v.* SHREEVE and others, Respondents.

12 W. 605.

Relief in equity against a judgment at law, upon certain bonds given for the indemnity of the obligee, as indorser of notes drawn by the obligor, the obligee having been indemnified. The assignee of such bonds takes them subject to all equities existing between the original parties.

THIS cause was argued by *Swann*, for the appellants, and by *Taylor*, for the respondents.

THOMPSON, J., delivered the opinion of the court.

This case comes up by appeal from the circuit court of the District of Columbia for the county of Alexandria. The object of the bill filed in the court below, was to obtain relief against a judgment at law recovered against Shreeve, the appellee, upon certain bonds given by him to Elisha Janney, and which bonds had been assigned to the appellant, Scott, as his trustee, for the benefit of his creditors.

In the progress of the cause, it was deemed necessary by the court that the Bank of Potomac should be made a party defendant. A supplemental bill for that purpose was accordingly filed, and the bank made a party.

The first inquiry that seems naturally to arise is, how the case stood as between Shreeve and Janney, the original parties to the bonds. The material facts upon which the complainant in the court below relied for relief, are not denied by the answer of Scott. From the bill and answer and exhibits in the cause, accompanied by a written agreement between the solicitors of the parties, before the cause was set down for argument, the leading facts in the case appear to be, that some time in the year 1808, Shreeve failed in business, being indebted to the Bank of Potomac in the sum of $6,300, upon a note discounted at the bank, * and upon [*606] which Janney was the indorser; for whose security Shreeve transferred to him, and John Roberts, who was also his indorser upon other notes, certain property at a valuation, but which, upon settlement of accounts between them, fell short of Janney's responsibility to the bank upon his indorsement, $1,980.88; for which, by agreement between the parties, Shreeve gave to Janney five bonds, payable in five annual instalments, and Janney was to pay the note to the bank, upon which he was the indorser. The note, however, was continued running in the bank in its original form, Janney appearing responsible as indorser only. This note was renewed from time to time until the 19th of May, 1809, when, by the payments which had been made by Janney out of the property assigned by Shreeve, it was reduced to the sum of $3,306; and Janney himself having failed about this time, no further payments were made upon this note until the month of June, 1818, when Shreeve, after a long absence, returned to Alexandria, and was called upon by the bank for payment of his note, upon which he paid the sum of $3,355.29, being the amount of principal and interest due upon the five bonds which he had given to Janney.

Upon this brief statement of the facts as between Shreeve and Janney, it will be seen that Shreeve was exposed to a double responsibility for the same debt. He was liable on his note held by the bank, (unless the bank may be considered as having assented to the arrangement, and accepted Janney as solely responsible on the note, which will be hereafter considered,) and he was also liable to Janney on the bonds which he had given him. For the purpose of indemnifying Shreeve against his responsibility to the bank, Janney gave him the instrument bearing date the 1st of March, 1809, acknowledging that Shreeve had satisfied him by his bonds of the 28th of February, 1809, for all demands against him as security at bank, and for all other accounts; and that the note above referred to, although originally discounted for the use of Shreeve, was continued in his name, but for the convenience of him, Janney, and engaging to

save Shreeve harmless from the said note, and in due time to take it up.

[*607] *An objection is here made to sustaining this bill in equity, because there was a complete and adequate remedy at law. But this objection cannot be sustained. The bonds given by Shreeve to Janney were simply for the payment of money, and although the consideration for which they were given had failed by Janney's neglect to pay up the note in the Bank of Potomac according to his engagement, this could not have been set up at law as a defence in the suit upon the bonds; nor could he, in that suit, have set off the amount paid to the bank upon his note. The engagement of Janney, on assuming the payment of the note to the bank, was a contract of indemnity only, and rested in damages, and could never form the subject of a set-off at law; and although an action at law might be maintained against Janney upon this indemnity, it would be going too far, even if Janney was solvent, to say that a court of equity could not interpose and stay a recovery upon the bonds, but that the party must be turned round to his remedy at law upon his indemnity. But, in the present case, it would be gross injustice, and a certain denial of all remedy, to refuse relief on this ground, Janney having become insolvent. There was, then, no defence at law which Shreeve could have set up against these bonds, nor had he any other remedy at law to which he was bound to resort.

Was there, then, any defence which he could have set up against a suit upon his note if he had permitted the bank to prosecute him? None is perceived by the court. He stood upon the note as maker, and was liable to the bank as such; and although by the agreement between him and Janney, the note was continued in that form for the convenience of Janney, yet the bank was no party to that arrangement, and could not be bound by it. Even admitting the knowledge of that agreement by the bank, it certainly could not have been set up as a defence to the note, unless it could be shown that there was an express or implied agreement to accept Janney as the debtor, and to discharge Shreeve.

It has been urged, however, on the part of the appellants, that the statute of limitations had run against the note, and that Shreeve might and ought to have availed himself of it.

[*608] *If the statute of limitations had run against this note, and might have been pleaded, we should be very unwilling to say that Shreeve was bound to plead it. It is a defence which a party may often avail himself of with great justice and propriety. But whether he will or not must be left to his own election. It is, however, unnecessary to inquire into the duty or obligation of Shreeve

to have pleaded the statute, under the circumstances of the case, because we do not think it could have been set up as a defence to the action.

The letter of license given by the bank to Shreeve bears date on the 12th January, 1809, and was for the term of seven years, which, of course, expired in January, 1816. It certainly cannot be pretended that the statute ran during the continuance of this letter of license. Payment of the note was demanded by the bank, and made by Shreeve, in June, 1818, about two years and five months after the expiration of the letter of license, a period much within the time necessary to bar the action.

The next inquiry is whether Scott, the assignee of Janney, has acquired any greater right or interest in these bonds than Janney himself had. So far as relates to the question whether the consideration had failed, the assignee stands precisely in the situation of the original party. He took the bond subject to all existing equities. This is the settled rule in chancery, and that which is recognized by the laws of Virginia which are in force in Alexandria. Nor has any thing occurred since the assignment to give to Scott or the creditors of Janney any additional rights. These bonds were assigned by Janney as his own property, and for the benefit of his own creditors, which was a violation of the trust and confidence reposed in him by Shreeve. They were given expressly, according to the agreement of the parties, to provide for the payment of the note to the Bank of Potomac; and it is admitted that no part of this note has been paid out of the funds of Janney. The note had been reduced from $6,300 to $3,306, at the time Janney failed in the spring of 1809; but these payments were made out of Shreeve's funds, assigned by Janney to Roberts by the deed of the 11th of August, 1808.
And it is also admitted that Scott, the assignee, *has made [*609] no payments upon this note since the assignment to him.
The creditors of Janney have, therefore, been deprived of none of his funds, nor can they have any right to claim the benefit of those bonds, which must be deemed to have been held by Janney in trust for the bank, and not as his own property.

The only remaining inquiry is, whether the bank, by any express or implied agreement, accepted Janney as their debtor, and discharged Shreeve from his responsibility.

The answer of the appellant, Scott, alleges that Janney considered himself as having assumed the payment of the note in question, and that he was considered debtor to the bank for the same, and was solely relied upon by the bank for the payment of the note; that he believed the bank had full knowledge of the deed of the 11th of

August, 1808, by which provision was made for the payment of the note, and were satisfied with it. And he further alleges that the bank was so well satisfied with this provision that it considered neither Janney nor Shreeve liable for it.

If these allegations were supported by proof, they would go far, if not conclusively, to show that the bank had adopted Janney as solely responsible for the note, and had discharged Shreeve. If so, the payment by Shreeve would be considered voluntary, and without any legal obligation, and would form no objection to the recovery on the bonds.

The bank, however, denies it was a party to the arrangement made by the deed of the 11th of August, 1808, or that it made any stipulation or agreement with Shreeve or Janney, in any manner connected with that deed, unless the order of the 12th of January, 1809, (the letter of license,) be considered as connected with it. The answer further denies that the bank ever did release or agree to release Shreeve, or that it ever did look solely to Janney, or the trust estate created by the deed of the 11th of August, 1808. It admits that, when this deed was executed, Janney and Roberts were both directors of the bank, but avers that no proposition in relation to it ever came before the board previous to the 12th of January, 1809, when the letter of license was granted to Shreeve, with the concurrence of Janney and Roberts, sitting and acting as directors of the bank.

[* 610] * The answer of Scott is not evidence against the bank, and his allegations with respect to the bank's having accepted Janney as the sole debtor for this note are entirely unsupported by proofs, and must be laid out of view, as they are positively denied by the answer of the bank, and which answer is strongly supported by the order for the letter of license, which was granted subsequent to the arrangement between Shreeve and Janney. For, if the bank had considered Shreeve exonerated from the payment of the note, there could have been no necessity for or propriety in giving him a letter of license. Indeed, it would have been absurd to give a letter of license to a man who was not a debtor to the bank. The order for this purpose is cautiously drawn, so as to retain the responsibility of both maker and indorser. The indulgence is granted expressly upon the condition that it is sanctioned by Janney, and without lessening the right of the bank against him.

Nor is the bank chargeable with negligence that can in any manner prejudice its rights, or of which the appellant has any right to complain. The indulgence was granted with the concurrence of Janney, and under an impression, no doubt, by all parties, that the trust

fund created by the deed of the 11th of August, 1808, would be sufficient to satisfy this note. And it was upon this supposition, no doubt, that the letter of license for seven years was granted to Shreeve. No steps would be taken against him until the expiration of that time, and demand of payment was made as soon thereafter as he returned to Alexandria.

The utmost, then, that can be alleged against the bank is, that it had full knowledge of the provision made by the deed of the 11th of August, 1808, for the payment of this note. And, admitting that provision to have been amply sufficient, it would not bind the bank, without its assent, to resort to that fund alone, and discharge the parties to the note. The bank could have no objection to the provision made by that deed for the payment of the note, as it would add to its security if the maker and indorser were also held responsible. And the proceedings in relation to the letter of license are conclusive to show that it was the understanding of all parties that the bank had not, at that *time, relinquished its [*611] claims upon Janney and Shreeve for the payment of the note.

We are, accordingly, of opinion that the decree of the court below, granting a perpetual injunction against the appellant, and a dismission of the bill as to the bank, be affirmed, with costs.

Ramsay v. Allegre.

12 W. 611.

A suit *in personam* against an owner of a vessel, for supplies, cannot be maintained in the admiralty, where the owner gave a negotiable promissory note for the debt, which has not been given up or tendered at the hearing.

Appeal from the circuit court of Maryland.

This was a libel filed in the district court by the appellant, Ramsey, against the respondent, Allegre, alleging that the appellant, at the special instance and request of the respondent, owner, ship's husband, or consignee of the schooner Dorothea, had performed various work and labor, and found and provided various materials for the use of the said schooner, to equip and prepare her for a voyage on the high seas, amounting to the sum of $2,428.84; that the appellant had often applied to the respondent for payment, and been refused, and praying process according to the course of the admiralty, &c. A plea was filed by the respondent, alleging, among other things, that he had given the libellant his negotiable promissory note for the debt. It appeared at the hearing that the appellant had furnished

the materials in question at the respondent's request, and
[*612] *that the latter had given his negotiable promissory note for the same, which the appellant accepted, giving the following receipt therefor: "Received a note, at four months, which, when paid, will be in full for the above amount." The note not having been paid, this suit was brought. The district court dismissed the libel, upon the ground that the jurisdiction of that court, as an instance court of admiralty, in the cause, was waived by the acceptance of the promissory note; and the decree having been affirmed in the circuit court upon the same ground, the cause was brought by appeal to this court.

The *Attorney-General* and *Meredith*, for the appellant.

[*613] *Hoffman* and *Meyer*, contrà.

MARSHALL, C. J., delivered the opinion of the court: that, as it did not appear by the record that the note had been tendered to
[*614] be given up, or actually surrendered, *at the hearing in the court below, the decree would be affirmed, it not being necessary to consider the question of jurisdiction.

JOHNSON, J. I concur with my brethren in sustaining the decree below, but cannot consent to place my decision upon the ground on which they have placed theirs. I think it high time to check this silent and stealing progress of the admiralty in acquiring jurisdiction to which it has no pretensions. Unfounded doctrines ought at once to be met and put down; and *dicta*, as well as decisions, that cannot bear examination ought not to be evaded and permitted to remain on the books to be commented upon and acquiesced in by courts of justice, or to be read and respected by those whose opinions are to be formed upon books. It affords facilities for giving an undue bias to public opinion, and, I will add, of interpolating doctrines which belong not to the law.

There need be no stronger illustration given than this case affords. Here is a libel, *in personam*, on a contract, in the admiralty, filed expressly upon the authority of the case of The General Smith, 4 W. 438. I had never read the report of that case, that I recollect, until the argument in this cause; or, if I had, I attached so little importance to any thing in it besides the point that it decides, as to have forgotten that such doctrines were to be found in the reports of our decisions. But, upon being examined, what does it amount to? A gentleman of the bar, whose knowledge, particularly in the admiralty,

commanded the highest respect in this court, is reported to have laid down a doctrine in very explicit terms, which, I will venture to say, has no authority in law; and the court, carried away probably by the influence of his concessions, echoes them in terms which are not only not called for by the case, but actually, as I conceive, contradicted by the decision which is rendered.

The correctness of the decision in the case of The General Smith cannot be questioned. It dismisses the libel upon the ground "that material-men and mechanics, furnishing repairs to a domestic ship, have no particular lien upon the ship itself for the recovery of their demands." *But why have they no lien upon the [*615] ship? or, to speak more correctly, why are they precluded from a remedy in the admiralty for subjecting the ship to arrest and sale in order to satisfy their demands? It is because jurisdiction over the contract has been taken from the courts of admiralty, and the exercise of jurisdiction in such a case prohibited to them by the common-law courts of Great Britain for hundreds of years. And it is a fact of the most positive certainty and notoriety, that, so far from retaining jurisdiction over this contract *in personam*, after being driven from jurisdiction *in rem*, that the former was first surrendered, and that in the most unequivocal terms.

I refer to the resolutions of February, 1632, adopted by the king in council, and subscribed by all the judges in England, and to be found in the collection of the sea-laws, and in various other books; by the 2d section of the 2d article of which it is declared, that "if suit be in the court of admiralty for building or mending, saving or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself party, (that is, a claimant,) no prohibition is to be granted, though this be done within the realm."

This resolution implies an express recognition, that if such suit be instituted against the person, a prohibition shall issue. And this I hold to be the test of admiralty jurisdiction; for, wherever a prohibition will issue, the jurisdiction has been taken away from the admiralty, or it never possessed it. And, accordingly, for two hundred years has this jurisdiction been abandoned by the British courts, with the single exception of seamen's wages; an exception of which it may emphatically be said, *probat regulam*. For, if any one will take the trouble to refer to the language of Holt, C. J., in the case of Clay *v.* Snelgrave, he will there find it said: "That it is an indulgence that the courts at Westminster permit mariners to sue for their wages in the admiralty court, because they may all join in suit, and

is grounded upon the principle, that *communis error facit jus.*" Lord Raym. 576.

This privilege is denied to the master, and even to a mate succeeding to the master, when he sues for his wages as mas-
[* 616] ter; *so rigid are the courts of Westminster in confining the admiralty to the few contracts over which it is permitted to retain jurisdiction. And when it is argued that this discrimination to the prejudice of the master is confined to his suit *in rem*, and that no case can be found in which his remedy *in personam*, in the admiralty has been denied him, it becomes necessary to remind counsel that this may have proceeded from no one's ever having had the temerity to prefer such a suit; a consequence which would necessarily follow from what I hold to be undeniable, that, except on the contract for seamen's wages, the proceeding *in personam* upon contracts is now unknown to the British admiralty tribunals.

I will sketch a brief history of the admiralty jurisdiction over contracts, and a view of its present state.

The study of the history of the admiralty jurisdiction in England, in common with that of all the courts of that kingdom, except the common-law courts, presents an instructive lesson on the necessity of watching the advancement of judicial power, in common with all power; inasmuch as it shows in what small beginnings, and by what indirect and covert means, aided by perseverance and ingenuity, originated the mighty structures against which, ultimately, the legislative and judicial power of the country had to exert the full force of their united efforts.

The vast variety and importance of the subjects which the admiralty had appropriated to itself will appear in a variety of authors; but I would refer the reader to Godolphin's "View of the Admiral Jurisdiction," as well for its antiquity, as the great learning and respectability of the author. There it will be seen that the admiralty, before the time of Richard II., had arrogated to itself a scope of judicial, legislative, and ministerial power, which withdrew from the trial by jury, and placed under the surveillance of the crown, of which the admiralty was only the representative, more than half the jurisprudence, and particularly the commercial jurisprudence, of the kingdom.

The statutes of 13th and 15th Richard II. were passed to set limits to this power, but such was the stability it had already ac-
quired, that it was not until the act of 2 Henry IV. c. 11,
[* 617] *which gave to the subject exactly the right which the constitution of the United States gives to its citizens against unconstitutional laws, was passed, that this overgrown power could

be effectually restrained. For it could then no longer prescribe its own limits in prejudice of the individual, and to the exclusion of his common-law rights. Neither the king nor his proctor could any longer justify or secure the individual who resorted to the admiralty, in a case in which the common law could give redress. 3 Levinz. 353.

The act of 13th Richard says, upon complaint of encroachments made by the admirals and their deputies, it is enacted: "That the admirals and their deputies shall meddle with nothing done within the realm, but only with things done upon the sea;" and the 15th Richard, c. 3: "That in all contracts, pleas, and quarrels, and other things done within the bodies of counties, by land or water, the admiral shall have no cognizance, but they shall be tried by the law of the land." And the 2d Henry IV. c. 11, provides: "That he that finds himself aggrieved against the form of the statutes of Richard shall have his action by writ, grounded upon the case against him that so pursues in the admiralty, and recover double damages."

The check given by legislative provision was followed up by prohibitions from the common-law courts, and suits under the statute of Henry, until, upon the murmurs of the lord high admiral at the checks imposed upon his power, the subject was taken up by the king in council, in 1632, and a kind of compromise entered into, to which all the different tribunals appear to have at first conformed; but in which, after a time, the common-law judges appear to have discovered that the crown and the admiralty had gained too decided an advantage over them, to admit of its being adhered to as a correct exposition of the statutes of Richard. Hence, in the 3d edition of Croke's Reports, at the end of the 2d volume, we find these resolutions declared to be of no authority, as undoubtedly they were not, since it was not a regular judicial act. But in this, it must be noticed that the authority denied to those resolutions was not on the subject *of those powers which the admiralty [*618] renounced, but of those which they retained.

Upon this ground, it is well known that these resolutions, although printed in the 1st and 2d editions of Croke's Reports, were omitted from the 3d. The *mantissa*, at the end of the edition of 1767, declares their rejection as authority. But, even before the adoption of those resolutions, a decision had taken place, which was conclusive as well against their jurisdiction over the particular contract here under consideration, as against their right of proceeding upon it by process *in personam*.

I allude to Craddock's case, 2 Brownl. 37, which was decided in

the 7th of James, or in the year 1608, twenty-four years before the date of these resolutions. This was distinctly the case of a material-man; his purchases were of cordage, powder, and shot, for a ship; and the party of whom they were bought sued Craddock in the court of admiralty. A prohibition was granted, and the reason assigned by the court is, that the statute 13th Richard II., "That the admiral shall not meddle with things made within the realm, but only of things made upon the sea; and here the contract was at St. Katharine's Stairs, in the body of a county." And thus we see that, in the resolutions alluded to, the claim to jurisdiction *in personam*, denied the admiralty by the effect of that adjudication, is abandoned by them, at the same time that they assert the right to exercise jurisdiction *in rem* upon the same class of contracts. It was not long after, however, that the exercise of jurisdiction *in rem* was also taken from them. And yet there is a semblance of authority for their having exercised it during the interval of time between the adoption of the resolutions of 1632 and when they were declared to be of no authority. I allude to that quotation from 1 Rolle's Abr. 533, which is copied into Bacon's Abridgment, Court of Adm., C., and there, together with the note which refers to Cro. Charles, 296, has remained, the permanent source of many an error to those who have not taken the trouble to examine into the authority for the law there laid down.

This subject will be found learnedly examined in the cases of Clinton *v.* The Brig Hannah and Ship General Knox, de-
[* 619] cided * in the admiralty by Judge Hopkinson, of Pennsylvania, in the year 1781; and by Judge Bee, in the admiralty of South Carolina, in the case of Shrewsbury *v.* The Sloop Two Friends, in 1786; in both which cases the authority of those quotations is rejected, and the lien of the shipwright to sue *in rem* in the admiralty denied. Bee's Adm. Rep. 419, 433.

Both those cases go to show the law of this subject at the adoption of our constitution, and they merit high respect both for the known abilities of the judges who pronounced them and the intrinsic learning they display. They show plainly that the quotations mentioned rest altogether on the authority of the resolutions of 1632, to which certainly no lawyer will attribute authority any further than they go to show that the admiralty did not even then pretend to the jurisdiction *in personam* upon contracts at all, and upon very few even *in rem*.

It may seem surprising that, from the time of Richard the Second down to the beginning of the seventeenth century, the jurisdiction of the admiralty court should have attracted so little of the attention of

the common law courts. One principal cause will be found in the civil wars and the low state of commerce; and when the nation returned to a state of tranquillity, the power and vigor of her monarchs left little scope for legislative or judicial action. Yet, there are cases to show that the subject was not forgotten; and when the increase of commerce and the weak reign of the Stuarts presented a motive and an opportunity, that the attention of the nation was attracted to the usurpations and unconstitutional power exercised by that court.

It is obvious, also, from the cases and discussions of that day, that the common law courts were embarrassed by a technical difficulty, arising out of the necessity of laying a venue to every action. As soon as this was removed, (and the advocates of the admiralty murmur very much at the supposed absurdity of removing this absurdity,) the progress of the common law courts was rapid in wresting from the admiralty every species of contract, leaving them none to act upon, on which they could themselves render complete justice according to the established rights of the parties. *They are [*620] charged with absurdity and inconsistency, but I pronounce the charge utterly groundless; for, the one principle runs through all their decisions, that of subjecting to the trial by jury every cause in which that form of trial could be applied without injury to the parties' rights. It is true that where they found them in the exercise of a power analogous to that of a court of equity, they did not take from the admiralty a power which they should only have handed over to another civil law court; they had no motive if they had the power to make the transfer. And hence the admiralty is left in the exercise of jurisdiction in cases of hypothecation, bottomry, and a kind of specific execution between part-owners of ships. Their jurisdiction of prize and salvage are royalties, and that over seamen's wages is a peculiarity, but perfectly reasonable and consistent, in whatever light it be viewed. In the sea laws it is called "a custom of the realm." Holt, C. J., we have seen, puts it on the ground of a positive concession and *communis* error. And the judges often say, "we permit them to exercise this jurisdiction, because they may sue together there, and must sue severally in the common law courts, and there they can have remedy upon the body of the vessel, which they cannot have here;" thus placing the exception in their favor upon the conceded ground of incapacity in the common law courts to do complete justice, and the equitable ground of preventing a multiplicity of suits.

My own opinion is that it stands on a much higher ground, and has its basis in the same policy which makes their wages to depend

on the safety of the ship they navigate, by giving them, in that event, every possible chance of getting compensated. To which we may add that their thoughtless character and ignorance renders them emphatically the wards of the admiralty, while the law on which they earn or lose their wages is a system of the admiralty. The assertion of the general principle against the captain's contract, finds its solution in his right to receive the freight in preference even to his owner, and thus to pay himself; and in the perfect competence of the common law courts to do justice in his contract with the owner. In the case of ransom, he still may resort to the admiralty and proceed *in rem.*

[* 621] * But, right or wrong, it is not to be questioned at this day that the admiralty have lost their jurisdiction over contracts, with the exceptions stated. The most animated advocates of the admiralty do not deny this. They mourn bitterly over its fall, but uniformly acknowledge that they are eulogizing the dead. In Godolphin, Sir Leoline Jenkins's Works, and the collection of the Sea Laws, will be found all in substance that ever was said on this subject. Yet, they all unequivocally acknowledge that its jurisdiction has long since been at an end over contracts, and *in personam*, with the exceptions I have stated; while they dwell eloquently on the folly of plucking this "diamond from the crown;" and enlarge greatly on the inconvenience of leaving to a jury the decision of causes which could be so much more advantageously disposed of by a single judge, and by a system of laws peculiar to the admiralty courts; and arraign with severity the inconsistencies, absurdities, and unkindly feelings with which the common law courts have stripped the admiralty of its ancient and eminent power. Even Brown, the modern champion in Europe of the admiralty jurisdiction, but who obviously has only caught the feelings and borrowed the arguments of those who have gone before him, is forced reluctantly to acknowledge that the admiralty has for ages been stripped of these powers, though he would spare no effort to restore them if he could. (See Appendix to his 2d vol. and note at the end, said to be omitted at p. 100.)

It has sometimes been contended that the decisions of the common law courts, as exemplified by their granting prohibitions, is not conclusive against the admiralty jurisdiction — that it is a disputed jurisdiction, and, therefore, that the admiralty judges themselves should be heard in this *Litis Contestatio.*

But this is obviously incorrect; for, the court of king's bench, by its acknowledged jurisdiction, as exemplified in the very exercise of its power to prohibit, is the very source to which we are to look for lights to determine the respective powers of the inferior courts. And

the decisions that have taken place on this subject, are nothing less than judicial expositions of the statutes which limit the powers of the admiralty. They amount to the construction and application *of the law of the realm, of the statute law, and [*622] are, therefore, conclusive. So every lawyer knows they are held to be in the British courts; and, together, they make up that system of law which, by universal consent, was adopted in the admiralty courts in this country before the Revolution, at least on the subject of jurisdiction over contracts, and *in personam*. I will now take a brief view of some of the leading decisions, in England and in this country, on the subject of contracts.

The quotations I shall first make have two objects in view; first, to show that the particular contracts under consideration, to wit, of material-men, have been denied to their jurisdiction; and, secondly, that, in every instance in which they have been prohibited from the exercise of jurisdiction over contracts, it has been upon a ground that is fatal to the exercise of jurisdiction in this and similar causes.

On this latter subject it would be unnecessary to search further than that article in the 4th Inst. 138, 141, in which Sir Edward Coke gives a detailed account of his own answers to the complaints of the lord high admiral to the king, against the restraints then recently imposed by the common law courts upon his jurisdiction. This was early in the reign of James the First; and, notwithstanding the revival of the clamors against that learned judge on the same subject, I cannot but express the opinion that it is a calm, dignified, learned, and triumphant answer. The authorities which he cites are valuable for their antiquity, as they show that the courts in his time were only treading in the steps of those who had preceded them.

Thus, to prove that charter-parties were without their jurisdiction, he cites Hore *v.* Unton, 31 Hen. VI., and observes that there were an infinity of cases to the same point.

To prove that policies of insurance were not of admiralty jurisdiction, he cites Crane & Pell, 38 Hen. VIII.

To prove that maritime contracts, notwithstanding a foreign origin, are not to be taken from the common law courts, he cites 28th, 39th, and 40th Eliz.

And, finally, it is important to advert to the manner in which he explains the rule by which it is to be determined whether any given contract is or is not of admiralty jurisdiction; *which [*623] is no other than by showing, from adjudged cases, that the common law courts have exercised and can exercise jurisdiction over the same contract. (p. 141.)

Sir Matthew Hale, in his History of the Common law, when

sketching the jurisdiction of the admiralty, says: "The jurisdiction of the admiral court, as to the matter of it, is confined by the laws of this realm to things done upon the high sea only; as depredations and piracies upon the high sea; offences of masters and mariners upon the high sea; maritime contracts made and to be executed upon the high sea; matters of prize and reprisal upon the high sea. But touching contracts or things made within the bodies of English counties, or upon the land beyond the sea, though the execution thereof be in some measure upon the high sea, as charter-parties, or contracts made even upon the high sea, touching things that are not in their connection maritime, as a bond or contract for payment of money, &c., these things belong not to the admiral's jurisdiction. And thus the common law and the statutes of 13 Rich. 2, c. 15, 15 Rich. 2, c. 3, confine and limit their jurisdiction to matters maritime, and such only as are done upon the high sea." C. 2, pp. 49, 50, 51.

I have before cited the case of Craddock, from Brownlow, to show how early the admiralty was prohibited from exercising jurisdiction, and that *in personam*, on the contracts of material-men. In a note to Abbott on Shipping, 136, it is asserted that the same is reported in Owen, under the title Leigh *v.* Burleigh. But I think it clearly a distinct case, as not only the parties but the facts are different; Owen, 122, but the principle of the decision is the same.

In Shephard's Abridgment, vol. 1, p. 125, is to be found an excellent summary of the ancient admiralty law; and one article merits notice, as it serves very distinctly to show the true origin of the articles in Rolle and Bacon's Abridgment, which have been so often relied upon as authority for a contrary doctrine. He quotes 3 Cro. 296, 297, for the following doctrine: "That a suit may be in the admiralty court for building, saving, amending, and victualling of a ship, against the ship itself, not against the party, but such as make themselves, for their interest, parties." This is the very language [* 624] * of the resolutions of 1632, and those are the pages in which they were inserted in the first two editions of Croke, before they were exploded.

Sir Leoline Jenkins, whose authority certainly no advocate of the admiralty will deny, acknowledges, in so many words, that the admiralty could not exercise jurisdiction over the contracts of material-men. 1st vol. 83.

That the remedy against the ship itself has long since been taken away is established by many authorities. In the American edition of Abbott on Shipping, a work entitled to great respect, it is laid down in very general terms, "that a shipwright, who has once parted with the possession of a ship, or has worked upon it without

taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessaries for a ship, are not by the law of England, preferred to other creditors, nor have any particular claim or lien upon the ship itself for the recovery of their demands." p. 135.

That the author is here speaking of a "claim or lien" in the admiralty, is fully established by reference to the cases which he cites and comments upon. The authorities he cites fully bear him out in his doctrine. They are chiefly Hoare *v.* Clement, 2 Show.; Justin *v.* Ballam, 2 Lord Raym. 805; Watkinson *v.* Barnardiston, 2 P. Wms. 367. And numerous other cases might be cited, both ancient and modern, to the same effect, upon which the doctrine seems fully established in England, that neither shipwrights nor material-men can sue in the admiralty, either *in personam* or *in rem*, without express hypothecation, and all assigning the universal reason, that they have the common law courts open to them. See also Buxton *v.* Snee, 1 Vesey, 155.

Some of those loose *obiter dicta*, in which the most eminent and prudent judges sometimes indulge, have been attributed to an eminent English jurist, which have been thought to cast some doubt upon these doctrines in modern times. The facts stand thus: In the 17th George III., Lord Mansfield is reported to have said, in the case of Rich *v.* Coe, Cowp. 636, "that a person who supplies a ship with necessaries, has not only the personal security of the master and owner, but, also, the security of the specific ship." And, again, *nine years after, he is reported to have repeated the [*625] same *dictum* in the case of Farmer *v.* Davis, 1 Term Rep. 108; in both instances, however, mere *gratis dicta*, with regard to the points, decided.

But in opposition to this, we have the expression of Lord Kenyon in the case of Westerdell *v.* Dale, 7 Term Rep. 306, which occurred eleven years after, in which he is reported to have said, that he doubted whether the doctrine had not been too generally laid down by Lord Mansfield; and referred to the authority of some of the old decisions, which establish the contrary doctrine. Indeed, when we refer to the language of Lord Mansfield himself, in the case of Wilkin's *v.* Carmichael, which occurred only two years after Rich *v.* Coe, it is difficult to imagine how the same judge could have held such inconsistent doctrines. For there, 1 Dougl. 101, he is reported to have decided, "that a carpenter, in parting with his possession, had lost his lien, if he ever had one;" "that creditors for stores and provisions had no lien," "and that work done for a ship in England is supposed to be on the personal credit of the employer; although, in

foreign ports, the master might hypothecate." This is all consistent with the established doctrines of the English courts; and the truth is, that if this learned judge had had the subject fully before him, on a motion for a prohibition, he would never have confounded the law of other states, or other times, with the common law of England in his time. To do him justice, what he decides in the last case, should be received as what he meant in the two former.

In the third American edition of Abbott on Shipping, 160, I find a note in these words: "It does not appear, that it has ever been held in the courts of the United States, that shipwrights and furnishers of supplies in the ports of the United States have not a lien on the ships, or a right to admiralty process, to recover the amounts due them. The question has not, to my knowledge, arisen in the supreme court of the United States. But in the district court of Maryland, after a very learned discussion, Judge Winchester decided, that a shipwright, by the maritime laws, has a lien [*626] on the ship for repairs done, and materials found by *him while the ship is in a port of the United States; Stevens *v.* The Ship Sandwich, 1 Peters's Ad. Rep. 233, note. The same opinion was given by Peters, Justice, in Pennsylvania, in Gardner *v.* The Ship New Jersey, 1 Peters's Ad. Rep. 223. See, also 1 Roll. Abr. 533 l.; 15 Cro. Car. 296."

From this note it appears that the learned editor, to whom I presume it is to be attributed, was not aware of the two decisions rendered by Judges Hopkinson and Bee, to which I have above alluded. Both of them will be found directly in point against the shipwrights' lien, and the research and learning which they display will be found worthy of the high reputation of the judges who rendered them. These cases will also be found interesting, from the circumstance of their containing criticisms upon the authority of the law upon which both Judges Peters and Winchester appear to have been misled; I mean the standing quotation from 2 Bacon, with its usual accompaniments from Roll. and Cr. Ch. i. e. Roll. Abr. 533, and Cro. Ch. 296.

I cannot, however, admit that the decision of Mr. Peters, in the case of The New Jersey, is a case in point on the proposed subject. For the question of the lien of material-men or shipwrights did not there arise. It is only mentioned *arguendo*, as an apology for making an allowance to the captain out of funds in the registry, for wages paid, and supplies furnished the vessel from his own funds. An allowance, which he at last excuses in a note, by saying, that "it was not opposed," and for which he might also have plead the high authority of the case of Watkinson *v.* Barnardiston, 2 P.

Wms. 367, in which the same thing was done, and that of The John, 3 Rob. 288. But the doctrine laid down as to material-men and shipwrights, by the learned judge, are *gratis dicta*, and, as is fully shown in the case of The General Smith, 4 W. 438, cannot be sustained by the authority quoted.

With regard to Judge Winchester's decision in the case of The Sandwich, 1 Peters's Ad. Rep. 233, note, it cannot be denied that it is directly in point. But it is equally true that it appeals to no authority that can sustain it. It is not by an exhibition of learning that decisions are to be tested, but by sound conclusions from unquestionable premises. To obstruct our inquiries by *a [*627] battery of cases, or learned and remote quotations, often obtain from faith concessions that ought to be yielded only to investigation. I admit that Judge Winchester's decision is characterized by learning, but certainly his premises cannot be conceded to him; they are founded in error. His course of reasoning is this:—

"The constitution of the United States vests in the United States admiralty and maritime jurisdiction, and that jurisdiction is vested in the district court." "In England, (I now quote his words,) where the jealousy of the civil law was most conspicuous, while its authority was openly denied, the principles of equity derived from that code influenced the decisions of their courts in as great a degree as in countries where it was adopted. In all of which, from the books within my power, I can obtain any legal information, every contest or dispute between the owners and mariners, and the owners and builders, or equippers of a ship for navigation on the sea, is of a maritime nature, and cognizable in the admiralty." He then goes on to observe, "that the statutes of 13th and 15th Richard II., have received a construction which must at all times prohibit their extension to this country;" and, finally, when he comes to state the proposition: "Has a shipwright a lien on the vessel by him repaired for the value of his materials, labor," &c.? he says, "to decide this question it is necessary to examine the nature of liens and privileged debts at the civil law;" and accordingly he proceeds to examine what is the law of various countries of the continent, which are subject to the civil law, and concludes with adopting two propositions, thus: "I am therefore of opinion that a ship-carpenter, by the maritime law, has a lien on the ship for repairs in port; and that the cause being a maritime cause, the court has a jurisdiction over the person as well as over the ship." The authorities which he quotes are, Zouch, Beawes, Valin, Rolle's Abr. 533, and 1 Bacon, 178.

Now, learned as this decision may be, it is obvious that it is but a tissue of errors, since it adopts the civil law as its guide, and the

admiralty law, in the time of its most extravagant preten-
[*628] sions, positively denying the authority of *the statutes of Richard, and the modifications which they introduced into the law maritime.

The laws of the continent of Europe furnish no authority on this question. Every state has its own laws on these contracts, as have most of the States of this Union. The ordinance of Louis XIV., on which Valin comments, is the statute law of France, and expressly vests in its courts maritime jurisdiction over a variety of contracts which the common law court has taken from the jurisdiction of the admiralty. The question is not what the civil law would give, but what remains to the admiralty of that jurisdiction, which no one denies that it had assumed under the authority of civil law principles.

The laws of Oleron, which may be called the statute law of Great Britain in maritime affairs, and which I am pleased to find published in Peters's first volume, together with Postlethwaite's Commentaries, give none of these powers over contracts to the admiralty.

I think it has been sufficiently shown, and, indeed, in denying authority to the British decisions, under the statutes of Richard, Judge Winchester must be held to admit that the British decisions are contrary to his decision on the lien of the shipwright.

Mr. Brown, in his 2d vol. pp. 80, 81, distinctly acknowledges it to be settled, "that no person can sue in the admiralty for work and labor done in the port before the voyage begins, or necessaries sold for the ship's use before she sails, nor even where supplied to a foreign ship lying in a British port." Where money is lying in the registry, as in the case decided by Judge Peters, there has been a disposition manifested recently, to get over the rigid rule, if there could be found an excuse for it; but none yet, I believe, has been found, except for money actually expended by the captain, and for which he might have hypothecated. There, perhaps, it may be considered as a *quasi* hypothecation. 3 Term Rep. 323; 2 P. Wms. 367; 2 Rob.

I will now show that Judge Winchester is equally unsustained in his other principle, to wit, that "on a maritime contract, as a general proposition, the court of admiralty has jurisdiction over
[*629] the person as well as over the ship." *I will not refer to the instance of bottomry by the master, because I do not believe that he had in mind that case, but will confine myself to the distinct proposition, "that in no case of contracts, except that of seamen's wages, can the admiralty proceed *in personam*," which is the point now before this court.

I have referred to the celebrated resolutions of 1632, in which, when the admiralty were solemnly gathering up and consecrating, as they thought, the remains of their jurisdiction, this right is, in express terms, relinquished; to Sheppard's Abridgment, in which, at a period long subsequent, such is given as the purport and exposition of that document; and I have quoted Craddock's case, and Leigh and Burleigh's case, in which the court of admiralty was expressly prohibited from proceeding *in personam*, in behalf of material-men. I should think here I have a right to demand, if from the whole library of law books, and God knows we have enough of them already, "camel loads," a single attempt to proceed *in personam*, upon a contract in the admiralty, except for seamen's wages, since the date of the resolutions of 1682, can be extracted. Adjudged cases cannot be found, because, since the antique cases to which I have referred, the right has been abandoned. *Dicta* enough can be produced, and some of those very modern.

Godbolt speaks of the process *in rem*, as the only process issuable in the first instance from the admiralty, 260.

In the edition of Abbott which I have quoted, in a note upon the case of Hoar *v.* Clement, p. 136, a case arising on a contract for necessaries, it is admitted, "that the court of admiralty had no jurisdiction over the person in that case."

In Johnson *v.* Shippen, 1 Salk. 35, in which a libel was filed against ship and owners, on an hypothecation for money borrowed abroad on her voyage, it was argued that, if suit lay against the owners at all, it lay at common law, and a prohibition was granted as to the suit against the owners, but refused as to the vessel.

In Ball *v.* Trelawney, 16, c. 1, Trelawney had sued in the admiralty on a foreign contract, *in personam;* obtained judgment, and Ball was in jail. The latter brought his *action [*630] under the statute, 2 Hen. VI. c. 11, recovered double damages, and was discharged on *habeas corpus*, on the ground of being in confinement in a cause *coram non judice*. Cro. c. 603, and 3 Lord Raym. 982.

Brown, vol. 2, 100, lays down the rule in these terms: "The general rule, however, at present, is, that the admiralty acts only *in rem*, and that no person can be subject to that jurisdiction but by his consent, expressed by his entering into a stipulation."

And even this mode, of subjecting the person through the medium of a stipulation, it is well known, was itself resisted at first, and acquiesced in only on the ground of its being an indispensable incident to the exercise of the jurisdiction *in rem*.

In Keble's Reports, p. 500, quoted by Brown, it is expressly said,

"that without a stipulation, the admiralty has no jurisdiction at all over the person."

In the case of Ousten *v.* Hebden, 1 Wils. 101, where one libelled in the admiralty, to compel his part-owner in a ship to join in a sale, a prohibition was granted, upon the ground that this was, in fact, an attempt to exercise a jurisdiction *in personam*.

There is a class of cases which may appear, at first view, to maintain a contrary doctrine, but which, upon examination, will be found consistent with the general principle.

The case of Manro *v.* Almeida, 10 W. 473, decided in this court, was one of that description. They are cases in which the admiralty proceeds *quasi in rem*, when the subject of the suit is withdrawn from its jurisdiction. These cases proceed upon the supposed contempt in withdrawing the *res subjecta* from the process *in rem*. This was the case of Smart *v.* Wolff, 3 Term Rep. 323, in which the prize court had improvidently ordered the cargo of the captured vessel to be delivered to the captors, reserving the question of freight, but without taking a stipulation bond, in a sum equal to what afterwards appeared due for freight. A monition from the admiralty was sued out to the captor's agent, to respond to the captain's demand for freight, to the full amount decreed to him; and against this proceeding, the court of king's bench refused a prohibition.

[*631] * Here the prize court acted upon a *quasi* hypothecation of the goods for the freight, resulting from their reserving the question of freight; and considered the captors in the light either of their own bailee of the goods, or in his original relation of captor, against whom, if the goods are not returned on monition, the court proceeds as on contempt.

In Manro *v.* Almeida, 10 W. 473, the libellant claimed redress against a foreign captor, in a cause peculiarly of admiralty jurisdiction. The captain of a foreign privateer had, on the ocean, seized a sum of money, in dollars, the property of the libellant, which the libellant alleged had been piratically taken; and finding property of the captor here, sued out process against the captor for the purpose of examining before the admiralty the correctness of the seizure, and obtaining indemnity for it. The principal question considered in that case, arose on the form of proceeding; but the object was the prosecution of a suit *in rem*, to wit, to obtain restitution of the $5,000 seized by Almeida on the ocean, as prize.

A case very similar to this is to be found in a note to the case of Smart *v.* Wolff, in which the admiralty proceeded against the agents of a captor to subject to its jurisdiction a sum of money that had

been taken out of a prize, and passed into account between the agent and his principal.

On the cases of this class, two remarks will always hold good. 1. They are instances in which the court of admiralty had jurisdiction of the principal question, not contracts, but maritime torts and prize causes, or their incidents; and, 2. That the process *in personam*, is only the means to get possession of the *res subjecta;* that is, of exercising an unquestionable jurisdiction *in rem.*

We sometimes hear of a concurrent jurisdiction between the admiralty and common law courts. But on the subject of contracts, which is the subject now under consideration, I deny that, with the exception of seamen's wages, any such concurrent jurisdiction can exist. It is an absurdity in terms, for the rule which goes through all the cases is in direct hostility with it. If the common law can try the cause, and give full redress, that alone takes away the admiralty jurisdiction. This is the principle on which the decisions rest *from the remotest periods. The contract [*632] of bottomry is sometimes cited as an instance of concurrent jurisdiction. But it is a mistake, and an instance cannot be cited, better to illustrate the true doctrine on this subject, than this species of contract. If executed by the master, jurisdiction of it is exclusive in the admiralty, because it gives remedy only *in rem.* But if executed by the owner, it becomes also a personal contract. Yet who ever heard of a remedy upon it as such, anywhere but in a common law court, or a court of equity? The contract of *respondentia*, which is as much a maritime contract as bottomry, gives no jurisdiction to the admiralty either *in rem* or *personam.* 2 Brown, 196, 197, and 4 East, 319.

The case of Menetone *v.* Gibbons, 3 Term Rep. 267, has nothing new in it; it is a recognition of doctrines as old as the hills. The question was, whether an hypothecation was taken out of the admiralty jurisdiction, because it was in that instance, a sealed instrument. The general jurisdiction of the admiralty to proceed *in rem* on a bottomry bond, was not denied. The court explicitly acknowledge the doctrine, "that if the common law can try the cause, the admiralty shall not, and affirm the jurisdiction of the admiralty merely on the ground that there was no action against the party at common law, and the common law courts could not proceed *in rem* under the hypothecation." As to the rule there laid down, "that the jurisdiction of the admiralty shall be adjudged *secundam subjectam materiam*, it is as ancient as Bridgeman's case, in the time of Hobart. Hob. 11. But this decision is of importance here in two points of view; since the court reason upon the principle throughout, that the

admiralty jurisdiction is to be tested by the common law remedy and the grant of prohibitions.

There was a case decided in this court in the year 1824, which merits some attention. I mean the case of The St. Jago de Cuba; 9 W. 409; in which the court, at first view, would seem to have given a decision in favor of the claims of material-men upon a foreign ship, in a case where no actual hypothecation had been executed. But there are several considerations from which it will appear that the court did not commit itself on that sub-
[*633] ject. The most material is, *that the question arose upon the application of money in the registry of the court, arising from the sale of the vessel for another cause. And, in such instances, it will be seen from several cases, some of which have been noticed in the course of this discussion, that the court may act towards creditors as if that had been done which might lawfully have been done in their favor. And there is a peculiar propriety in doing this, when the court, by selling the vessel, has put it out of the power of the captain to give that security to creditors which it is reasonable to suppose would have been given, where the captain had no other means of getting advances made of money or materials. Several cases have been noticed of the captain himself having the benefits of an actual hypothecation extended to him when he expends his own money where he might have raised it on bottomry, and the proceeds of the vessel are in the registry of the court. Yet this has been severely questioned in the British courts. 9 East, 426. Attention to the language of the court, also, will show that they have been guarded on this subject.

The question which the court is examining, is not whether the lien of a material-man attaches independently of an actual hypothecation, but whether, if the master has exercised this "power of pledging or subjecting the vessel to material-men," the forfeiture to the government, without notice, would supersede their rights. And, although speaking of implied liens, whether the material-man here retained his supposed lien on the money in the registry, was distinctly the question, and the language of the court ought not to have any other effect given to it.

Yet, I am free to confess, individually, that in a case in which an hypothecation would be so clearly valid and legal, if actually made, I should want nothing but authority to induce me to sustain such a claim against the vessel; with regard to money in the registry, I think this case is authority for sustaining it, and that it is sanctioned by other authorities. *Vide* case of The New Jersey, 1 Peters's Ad R. 223, and The John, 3 Rob. 288.

Mr. Brown, (vol. 2, p. 100,) has thought proper to charge the common law courts with having "involved the subject we are now upon in endless confusion." [*634]

To me it appears that the charge may more correctly be made upon those who have engaged, like himself, with so much zeal, in an effort to shake the authority of a course of decisions that are uniform and consistent, and, with one single exception, (which exception is acknowledged as arbitrary, or positive law,) reducible to a single principle; a principle altogether fatal to this action in its origin, since there can be no question that the party here had his common-law remedy.

And I consider the effort particularly ungracious in an author who is driven to acknowledge its futility so often; one who confesses in so many words,

"That if the parties have bound themselves to answer personally, the admiralty cannot take cognizance of the question." Vol 2, p. 101.

"That the admiralty has, in a great measure, (he should have said altogether,) dropped its claim to taking cognizance of charter-party, freight, and suits by material-men, and almost all other proceedings upon contract, except those for recovery of seamen's wages, or enforcing bottomry bonds." p. 103.

"That the admiralty is excluded from jurisdiction of contracts if personal, or sealed, or made on land." p. 107.

"That the jurisdiction of the instance court of admiralty, which is at present seemingly (he should have said actually) allowed by the law courts, is, that it is confined, in matters of contract, to suits for seamen's wages, or those on hypothecations; in matters of tort, to actions for assault, collision, and spoil; and in *quasi* contracts, to actions by part-owners for security, and actions of salvage." p. 121.

"That the contract of insurance is, in practice, uniformly and decidedly out of the cognizance of the admiralty." p. 188.

And finally, to acknowledge, in the last page of his book, among his *errata et omissa*,

"That personal contracts are held not to be cognizable in the admiralty."

It has sometimes been said, that this is a disputed jurisdiction; but by whom is it disputed? Not by the courts [*635] of Great Britain; for, in all their courts, as well of common as of civil law, when called distinctly to act upon the jurisdiction of the admiralty, there is no dispute, no contrariety of opinion; they all are governed by the same rules of decision. From time to time,

some extravagant admirer of admiralty jurisdiction, or royal prerogative, has risen up in England, who has revived the ancient murmurs uttered by the friends of that court, when reluctantly putting off its usurped powers; but, with that exception, I know of no part of the English law that seems more clearly fixed than that of the admiralty jurisdiction. The misfortune is, that people will not be content to leave it as they find it, but employ themselves in efforts to revive what they cannot but acknowledge has been long since extinct. If the learning upon this subject should appear remote and antiquated, let it be remembered that the law has been fixed in England for two centuries. And since the futile attempt of Sir L. Jenkins to revive it, no one, I believe, until Mr. Brown appeared before the public, had made any attempt to change the law of the admiralty in that kingdom.

I have felt it my duty to pay some attention to the subject, for several reasons.

In the first place, I stand before the public as bearing my share of the responsibility incurred for certain opinions expressed in the case of The General Smith, 4 W. 438. For the just extent of my responsibility in that case, I must rely on the repeated decisions which I have made in my circuit in hostility with that doctrine. But I am willing to treat it as my own error, and shall on that ground claim the privilege of treating it with the greater freedom; at least, I shall endeavor to administer the antidote if I have diffused the poison, and claim credit for an unequivocal proof of my repentance, by a public acknowledgment that it was inexcusable.

I will now examine that case upon its authorities, and its consistency with itself.

The case of The General Smith, was a case of the most extravagant attempt ever made to enforce this supposed lien of material-men. It serves to show to what embarrassments [*636] *the commercial world might be exposed by pushing these maritime liens to excess. Since, upon the same principle on which the libel was there filed, however long the time that had elapsed, whatever number of voyages the vessel had made, and whatever changes of property she might have passed through, she would still have remained liable to material-men. For, in that instance, The General Smith had made a voyage, and the property of her been changed, before the libel was filed. She was admitted, too, to be an American ship, in her home port. The court below very properly dismissed the libel, and this court did not hesitate to affirm the dismission; and confined to its just import as an adjudication, it is most unquestionably correct.

No man will subscribe more implicitly than myself, to the authority of decisions in this court; and I am ready at all times to adhere to the principles necessarily deducible from, or conducing to such decisions. But further than this no judge is bound to subscribe to authority, for no other subjects are considered and adjudicated.

But the report informs us, that Mr. Pinkney, who argued against the material-men, "admitted the general jurisdiction of the district court as an instance court of admiralty over suits by material-men *in personam* and *in rem*, but denied that a suit could be maintained in the present case, because the parties had no specific lien upon the ship for supplies furnished in the port to which she belonged. That in the case of materials furnished or repairs done to a foreign ship, the maritime law has given such a lien, which may be enforced by a suit in the admiralty. But in the case of a domestic ship, it was long since settled by the most solemn adjudications of the common law, (which was the law of Maryland,) that mechanics have no lien upon the ship itself for their demands, but must look to the personal security of the owner." 4 W. 441, 442.

Now I have too high an opinion of Mr. Pinkney's law-reading, and of his talents as an advocate, not to be well convinced that in this, as well as the residue of the argument attributed to him, he must have been misunderstood. And I find my sanction for this belief upon the face of the report itself; for, with the exception of the
* nullity of the *lien claimed against a domestic ship, the [*637]
authority which he quotes to sustain his doctrine, contradicts it in so many words.

His quotations are Abbott on Ship. pt. 2, c. 3, ss. 9 to 13, and the case of The Levi Dearborne, 4 Hall's Am. L. J. 97. The last quotation was a case of material-men suing *in rem* in a home port, and was in point. But the quotation from Abbott was no other than the very passage on which I have before commented, and which, although commencing with stating the doctrines ascribed to Mr. P., as prevailing on the continent of Europe, shows most distinctly that the law is otherwise in England. Mr. P. never would have quoted, to support such doctrines, an author who has been shown to assert "that a shipwright, who has once parted with a ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessaries for the ship, (that is, material-men,) are not by the law of England preferred to other creditors, nor have any particular claim of lien upon the ship itself, for the recovery of their demands."

Mr. Pinkney's quotation from Abbott comprises, and is limited to

the sections that are occupied in maintaining the doctrine thus laid down by the author, and in showing expressly, that it extends to a foreign as well as a domestic ship. In section 10, the author cites Justin *v.* Ballam, 2 Lord Raym. 805, which he considers as conclusive against the foreign ship. The distinction taken, is not between a domestic and foreign ship, but between a ship "on her voyage and absent from her owner, and one in her home port." And even in that case, the law, as laid down by the learned annotator to Abbott, in a note to the 8th section, upon 9 East, 426, in the language of Lord Ellenborough, is, "that the master may hypothecate, not that the hypothecation attaches *per se* on the contract for necessaries." It is true, he cites Judge Peters's decision in the case of The New Jersey, for a contrary doctrine; but he seems not to have adverted to the distinction recently admitted between distributing money in the registry, which is Judge Peters's case, and that of arresting the vessel and subjecting her to sale. Nor has he adverted to the fact, [*638] that Judge Peters places his decision on the authority * of the English cases, which the text of Abbott alone will show are directly hostile to it. To which may be added, that even Judge Peters does not countenance the doctrine of a right of proceeding *in personam*, attributed to Mr. Pinkney. But this, also, when we find the rest of his reported argument so clearly a mistake, we have good reason for hesitating to ascribe to him. And the rather, for that, so well read a lawyer would not have advanced so bold a doctrine, without attempting to find some shadow of authority for it. Even Mr. Winder, who argued against Mr. Pinkney, does not venture to put his case upon the law of England, but relies upon the law of the continent, and insists on a right arbitrarily to adopt it here.

Mr. Winder quotes Judge Winchester's decisions, and the case of De Lovio *v.* Boit, from 2 Gallison, 400. But Judge Winchester affords no authority, since he decides on grounds which I have shown to be altogether heterodox or exploded.

With whom the idea originated that the admiralty and maritime jurisdiction vested by the constitution in the United States, was that which the admiralty possessed or pretended to, before the time of Richard II., I am at a loss to conceive. Judges Hopkinson, Bee, and Peters, all distinguished revolutionary men, educated before the Revolution, and deeply engaged in public life until long after the constitution, concurred in fixing the period of the Revolution for the law of the jurisdiction of the admiralty. And who can doubt that the doctrine of that day was that the jurisdiction anciently claimed by that court was founded in usurpation. The acts of Richard expressly

declare it; that of Henry treated it as vain and void; and such all history proves it. Yet it is only by going back to those early times, that a shadow of authority can be found for the pretensions which it seems disposed to put forth in our day.

Of the case in 2 Gallison, I will only remark, that it was a decision in the first circuit, in which the right to proceed *in personam* in the admiralty was asserted, in a suit upon a policy of insurance; and if the *uisi prius* decisions of the judges of this court are of any authority here, it is only necessary to observe that a contrary decision has been rendered in the sixth circuit. Let them, therefore, fall together; *and let the question be tested upon principle [*639] and authority, independent of those decisions.

I now come to the consistency of the opinion of the court in The General Smith, 4 W. 443, with itself.

That decision is, that the common law is the law of Maryland in regard to the rights of material-men, and that it has long since been settled that they have no remedy *in rem*. But the opinion is introduced with a *dictum* purporting that, had they sued in the admiralty *in personam*, there would have been no doubt of their right to proceed.

And here the question is, whether there can be found anywhere in the books, a case in which an action *in personam* could be maintained in the admiralty, wherein the action *in rem* was denied to that court. No such case can be found; and the reason is obvious; that right alone would take away the admiralty jurisdiction altogether, since it would follow that the right might be pursued at the common law; the case of seamen's wages always excepted, which I regard as positive law, and which, indeed, has been supposed by some to be retained by the admiralty, under the authority given that court by a statute of one of the Henrys, to control mariners in regard to the amount of their wages.

Let the cases be searched from the remotest period down to the time of Menetone *v.* Gibbons, 3 T. R. 267, and the ground of prohibition, and of recovery, under the 2d of Henry IV. will uniformly be found to be the competency of the common law to enforce the contract. This is the principle by which even their jurisdiction *in rem* is controlled, and hence it follows, that in no case in which they are prohibited from proceeding *in rem*, can they have the action *in personam*.

I consider the decision, therefore, in the case of The General Smith, as conclusive against the doctrine which asserts the right of material-men to proceed *in personam*, and upon the authority of which the present suit is avowedly instituted. At least, as there is

no authority given for it by the court, we may conclude that it has no better authority than that on which we are given to understand Mr. Pinkney relied for the same doctrine.

I have now said a great deal on this subject, and I could not have said less, and discharged the duty which I feel that I owe [*640] *to the community. I am fortifying a weak point in the wall of the constitution. Every advance of the admiralty is a victory over the common law; a conquest gained upon the trial by jury. The principles upon which alone this suit could have been maintained, are equally applicable to one half the commercial contracts between citizen and citizen. Once establish the rights here claimed, and it may bring back with it all the admiralty usurpations of the fifteenth century. In England there exists a controlling power, but here there is none. Congress has, indeed, given a power to issue prohibitions to a district court, when transcending the limits of the admiralty jurisdiction. But who is to issue a prohibition to us, if we should ever be affected with a partiality for that jurisdiction?

I, therefore, hold that we are under a peculiar obligation to restrain the admiralty jurisdiction within its proper limits.

That in case of contracts it has no jurisdiction at all *in personam*, except as incident to the exercise of its jurisdiction *in rem*.

That with regard to the contracts of shipwrights and material-men in her home port, the vessel cannot be subjected, unless by express hypothecation by the owner.

That on her voyage, and where the master is destitute of other means of raising the necessary funds, she may be so subjected by the master, but it must be by actual hypothecation.

But that when the ship has been sold for other claims, and the money in the registry, so that the master no longer has it in his power to raise money on her bottom to satisfy demands which have been legally incurred, cases may arise in which the claims of material-men and shipwrights, and of the master himself, may be sustained without actual hypothecation. *Decree affirmed.*

3 H. 568; 5 H. 441; 6 H. 344; 19 H. 22.

DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1828.

JUDGES DURING THE TIME OF THESE REPORTS.

HON. JOHN MARSHALL, CHIEF JUSTICE.
HON. BUSHROD WASHINGTON,
HON. WILLIAM JOHNSON,
HON. GABRIEL DUVALL,
HON. JOSEPH STORY,
HON. SMITH THOMPSON, AND
HON. ROBERT TRIMBLE,
} ASSOCIATE JUSTICES.
WILLIAM WIRT, ESQ., ATTORNEY-GENERAL.
WILLIAM THOMAS CARROLL, ESQ., CLERK.
TENCH RINGOLD, ESQ., MARSHAL.

CLEMENT S. HUNT, Appellant, *v.* CHRISTOPHER RHODES, WILLIAM ENNIS, and RICHARD K. RANDOLPH, Administrators of Lewis ROUSMANIERE, deceased, Appellees.

1 P. 1.

Where parties deliberately agree not to secure a debt by mortgage, but to give and receive a power of attorney authorizing the creditor to sell certain property of the debtor, and apply its proceeds to the payment of the debt, and the power is annulled by the death of the debtor, a court of equity will not direct a new security to be given, or fix a lien on the property as security for the debt, though satisfied that the parties acted in ignorance of that rule of law which makes the death of the constituent a revocation of the power.

THE proceedings which were had in this cause after it had been remanded by this court to the circuit court, are stated in the opinion of the court.

Kimball and *Webster*, for the appellant.

Wirt, (attorney-general,) and *Robbins*, contrà.

[*9] *WASHINGTON, J., delivered the opinion of the court.

This case was before this court in the year 1823, and is reported in 8 W. 174, and was then argued at great length, by the counsel concerned in it. After full consideration, it was decided that the power of attorney given by Rousmaniere, the intestate, to the appellant, Hunt, authorizing him to make and execute a bill of sale of three fourths of The Nereus and of The Industry, to himself, or to any other person, and in the event of their being lost, to collect the money which should become due under a policy upon them and their freight; was a naked power, not coupled with an interest, which, though irrevocable by Rousmaniere, in his lifetime, expired on his death.

That this species of security was agreed upon, and given under a misunderstanding by the parties, of its legal character, was conceded in the argument of the cause, by the bar and bench; and the second question for the consideration of the court was, whether a court of equity could afford relief in such a case, by directing a new security of a different character to be given; or by decreeing that to be done which the parties supposed would have been effected by the instrument agreed upon? After an examination of the cases applicable to the general question, it was stated by the chief justice who delivered the opinion of the court, that none of them asserted the naked principle that relief could be granted on the ground of ignorance of law, or decided that a plain and acknowledged mistake in law was beyond the reach of a court of equity. The conclusion to which he came is expressed in the following terms:—

"We find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief."

[*10] *The decree was, accordingly, reversed; but the case being one in which creditors were concerned, the court, instead of giving a final decree on the demurrer, in favor of the plaintiff, directed the cause to be remanded, that the circuit court might permit the defendants to withdraw their demurrer, and to answer the bill.

After the cause was returned to that court, the demurrer was withdrawn, and an answer was filed, in which the defendants, after admitting the loans mentioned in the bills, by the plaintiff to their

intestate, and the notes given for the same by the latter, and their non-payment, assert their ignorance of any agreement between the plaintiff and their intestate, that the former should have a specific security, other than the powers of attorney, to sell vessels and to collect the proceeds, or the amount of the policies, in case they should be lost; but express their belief that the powers of attorney were selected by the plaintiff, in preference to the other securities which were offered by the intestate. The answer further states that the estate of Rousmaniere is greatly insolvent, and had been so before his death; that the plaintiff had exhibited and proved his demand, as stated in his bill, before the commissioners of insolvency duly appointed upon the estate of Rousmaniere; and that his dividend thereon declared, or to be declared, the defendants were, and would be, ready to pay according to law.

The principal deposition taken in the cause, is that of Benjamin Hazard, counsellor at law, who deposes that he drew the powers of attorney annexed to the original bill. That on the day the first power was executed, Hunt and Rousmaniere came to his office, when the latter stated that the former had loaned, or agreed to loan, to him a sum of money, upon security to be given by him on his interest in the brig Nereus, and that he was desirous the security should be as ample and available to Hunt as it could be made. That he wished, and was ready to give a bill of sale of the property, or a mortgage on it, or any other security which Mr. Hunt might prefer. Both the parties declared that they had called upon the witness, to request him to draw the writings, and to obtain his opinion as to the kind of instrument which would give the most perfect security to the lender. That the deponent then told the parties that a bill of sale, or mortgage, would be good security, but that an irrevocable power of attorney, such as was afterwards executed, would be as effectual and good security as either of the others, and would prevent the necessity of changing the vessel's papers, and of Hunt's taking possession of the vessel, upon her arrival from sea. That the parties then requested him to draw such an instrument *as, in his opinion, would most [*11] effectually and fully secure Mr. Hunt; and that the plaintiff frequently asked him, whilst he was drawing the power, and after he had finished, and read it to the parties, if he was quite certain that the power would be as safe and available to him as a bill of sale or mortgage, and that, upon his assurances that it was, it was then executed. The witness then proceeds to express his opinion, from his knowledge of the parties, and from their declaration at the time, that Rousmaniere would readily have given an absolute

bill of sale of the property, or any other security which could have been asked; and that Hunt would not have accepted the one which was afterwards executed, if he had not considered it to be as extensive and perfect a security, in all respects, as an absolute bill of sale; and he adds, more positively, that such was the understanding and agreement of both the parties.

It appears by the testimony of this witness that he drew the power of attorney, concerning The Industry, for securing the second loan made by the plaintiff to Rousmaniere, and that the circumstances attending that transaction were essentially the same as those which have been stated in respect to the first loan.

We find another deposition in the record which deserves to be noticed, as it consists of declarations made by the plaintiff after the powers of attorney were executed, and may serve in some measure to explain the more positive testimony given by Mr. Hazard. This witness, William Merchant, deposes that, after the decease of Rousmaniere, the plaintiff stated to him, and to a Mr. Rhodes, that in consequence of his declining to engage in an enterprise in one of the vessels of Rousmaniere, to which he had at one time consented, and of the complaints of Rousmaniere, on that account, he was induced to offer to Rousmaniere a loan of money. That an agreement was accordingly made, by which he, Hunt, was to let Rousmaniere have a certain sum on loan, and Rousmaniere was to give him a bill of sale of a certain vessel; but that afterwards, Hunt, reflecting that if he took that security he would have to take out papers at the custom-house in his own name, be subject to give bonds for the vessel, and perhaps be made liable for breaches of law committed by others, he consulted with Mr. Hazard upon the subject; who told him that he could or would draw an irrevocable power of attorney, to sell which, would do as well, and which was accordingly done.

The cause coming on to be heard in the court below, and that court being of opinion that the plaintiff had then no lien, or
[* 12] specific security upon these vessels, and no equity to * have such lien or security created against the general creditors of Rousmaniere, dismissed the bill; from which decree the cause has been brought, by appeal, to this court.

It must be admitted that the case, as it is now presented to the court, is not materially variant from that which we formerly had to consider; except in relation to the rights of the general creditors against the insolvent estate of a deceased debtor, in opposition to the equity which a particular creditor seeks, by this bill, to set up. The allegations of the bills filed in this cause, which were on a former

occasion admitted by the demurrer to be true, are now fully proved by the testimony taken in the cause.

Before proceeding to state the general question to which the facts in this case give rise, or the principles of equity which apply to it, it will be necessary distinctly to ascertain what was the real agreement concluded upon between the plaintiff and the intestate, the performance of which, on the part of the latter, was intended to be secured by the powers of attorney? Was it that Rousmaniere should, in addition to his notes for the money agreed to be loaned to him by the plaintiff, give a specific and available security on The Nereus and The Industry, or, was the particular kind of security selected by the parties, and did it constitute a part of the agreement? It is most obvious, from the plaintiff's own statement in his amended bill, as well as from the depositions appearing in the record, that the agreement was not closed until the interview between the parties to it with Mr. Hazard, had taken place. The amended bill states that the specific security which Rousmaniere offered to give, was a mortgage of the two vessels, for which irrevocable powers of attorney were substituted, by the advice of Mr. Hazard, and for reasons which it would seem, were approved of and acted upon by the plaintiff. From the testimony of Mr. Merchant, it would appear that the security proposed by Rousmaniere was a bill of sale of the vessels, which the plaintiff declined accepting for reasons of his own, uninfluenced by any suggestions of Mr. Hazard, who merely proposed the powers of attorney as a substitute for the other forms of security which had been offered by Rousmaniere. The difference between these statements is not very material, since it is apparent from both of them that the proposed security, by irrevocable powers of attorney, was selected by the plaintiff, and incorporated into the agreement by the assent of both parties. The powers of attorney do not contain, nor do they profess to contain, the agreement of the parties; but was a mere execution of that agreement, so far as it stipulated to give to the plaintiff a specific security on the two vessels, in the mode selected and approved of by the parties, to *which [* 13] extent it was a complete consummation of the agreement.

Such was the opinion of this court upon the former discussion of this cause in the year 1823, and such is its present opinion. Upon this state of the case the general question to be decided is the same now that it formerly was, and is that which has already been stated.

There are certain principles of equity applicable to this question, which, as general principles, we hold to be incontrovertible. The first is, that where an instrument is drawn and executed, which professes, or is intended to carry into execution an agreement, whether in writ-

ing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fufil, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. The reason is obvious. The execution of agreements fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and if the instrument which is intended to execute the agreement be, from any cause, insufficient for that purpose, the agreement remains as much unexecuted as if one of the parties had refused altogether to comply with his engagement; and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as in the other, by compelling the delinquent party fully to perform his agreement, according to the terms of it, and to the manifest intention of the parties. So if the mistake exist, not in the instrument which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a court of equity will, in general, grant relief, according to the nature of the particular case in which it is sought. Whether these principles, or either of them, apply to the present case, must, of course, depend upon the real character of the agreement under consideration. If it has been correctly stated, it follows that the instrument by means of which the specific security was to be given, was selected by the parties to the agreement, or rather by the plaintiff, Rousmaniere having proposed to give a mortgage, or bill of sale of the vessels, which the plaintiff, after consideration and advice of counsel, thought proper to reject, for reasons which were entirely satisfactory to himself. That the form of the instrument so chosen by the plaintiff, and prepared by the person who drew it, conforms in every respect to the one agreed upon, it is not even asserted in the bill or in the argument of counsel. The avowed object of the plaintiff was to obtain a valid security, but in such a manner as that the legal interest in [* 14] the property should remain with *Rousmaniere, so that the plaintiff might be under no necessity to take out papers at the custom-house in his own name, and might not be subject to give bonds for the vessels, or to liabilities for breaches of law, committed by those who were intrusted with the management of them. That the general intention of the parties was to provide a security as effectual as a mortgage of the vessels would be, can admit of no doubt; and if such had been their agreement, the insufficiency of the instruments to effect that object, which were afterwards prepared, would have furnished a ground for the interposition of a court of equity, which the representatives of Rousmaniere could not easily

have resisted. But the plaintiff was not satisfied to leave the kind of security which he was willing to receive undetermined; having finally made up his mind, by the advice of his counsel, not to accept of a mortgage, or bill of sale, in nature of a mortgage. He thought it safest, therefore, to designate the instrument; and, having deliberately done so, it met the view of both parties, and was so completely incorporated into their agreement as were the notes of hand for the sum intended to be secured. In coming to this determination, it is not pretended that the plaintiff was misled by ignorance of any fact connected with the agreement which he was about to conclude. If then the agreement was not founded in a mistake of any material fact, and if it was executed in strict conformity with itself, we think it would be unprecedented for a court of equity to decree another security to be given, not only different from that which had been agreed upon, but one which had been deliberately considered and rejected by the party now asking for relief; or to treat the case as if such other security had in fact been agreed upon and executed. Had Rousmaniere, after receiving the money agreed to be loaned to him, refused to give an irrevocable power of attorney, but offered to execute a mortgage of the vessels, no court of equity could have compelled the plaintiff to accept the security so offered. Or if he had totally refused to execute the agreement, and the plaintiff had filed his bill, praying that the defendant might be compelled to execute a mortgage instead of an irrevocable power of attorney, could that court have granted the relief specifically asked for? We think not. Equity may compel parties to perform their agreements, when fairly entered into according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise, is highly beneficial to society. The latter is without its authority, and the exercise of it would be not only a usurpation of power, but would be highly mischievous in its consequences.

*If the court could not have compelled the plaintiff to ac- [*15]
cept, or Rousmaniere to execute any other instrument than the one which had been agreed upon between them, the case is in no respect altered by the death of the latter and the consequent inefficiency of the particular security which had been selected; the objection to the relief asked for being in both cases the same, namely, that the court can only enforce the performance of an agreement according to its terms and to the intention of the parties; and cannot force upon them a different agreement. That the intention of the parties to this agreement was frustrated by the happening of an event not thought of, probably, by them or by the counsel who was consulted upon the

occasion, is manifest. The kind of security which was chosen, would have been equally effectual for the purpose intended, with a mortgage, had Rousmaniere lived until the power had been executed; and it may therefore admit of some doubt, at least, whether the loss of the intended security is to be attributed to a want of foresight in the parties or to a mistake of the counsel in respect to a matter of law. The case will, however, be considered in the latter point of view.

The question, then, is, ought the court to grant the relief which is asked for, upon the ground of mistake arising from any ignorance of law? We hold the general rule to be that a mistake of this character is not a ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their characters.

The strongest case which was cited and relied upon by the appellant's counsel, was that of Lansdown *v.* Lansdown, reported in Mosely, 364. Admitting, for the present, the authority of this case, it is most apparent, from the face of it, that the decision of the court might well be supported upon a principle not involved in the question we are examining. The subject which the court had to decide, arose out of a dispute between an heir at law and a younger member of the family, who was entitled to an estate descended; and this question the parties agreed to submit to arbitration. The award being against the heir at law, he executed a deed in compliance with it, but was relieved against it on the principle that he was ignorant of his title.

If the decision of the court proceeded upon the ground that the plaintiff was ignorant of the fact that he was the eldest son, it was clearly a case proper for relief, upon a principle which has already been considered.

If the mistake was of his legal rights, as heir at law, it is not
[*16] going too far to presume that the opinion of the court * may have been founded upon the belief that the heir at law was imposed upon by some unfair representations of his better informed opponent; or that his ignorance of a legal principle, so universally understood by all where the right of primogeniture forms a part of the law of descents, demonstrated a degree of mental imbecility, which might well entitle him to relief. He acted, besides, under the pressure of an award, which was manifestly repugnant to law, and, for aught that is stated in this case, this may have appeared upon the face of it.

But if this case must be considered as an exception from the general rule which has been mentioned, the circumstances attending it

do not entitle it, were it otherwise unobjectionable, to be respected as an authority, but in cases which it closely resembles. There is a class of cases which it has been supposed forms an exception from this general rule, but which will be found, upon examination, to come within the one which was first stated. The cases alluded to are those in which equity has afforded relief against the representatives of a deceased obligor, in a joint bond, given for money, lent to both the obligors, although such representatives were discharged at law. The principle upon which these cases manifestly proceed is, that the money being lent to both, the law raises a promise in both to pay, and equity considers the security of the bond as being intended, by the parties, to be coextensive with this implied contract by both to pay the debt. To effect this intention, the bond should have been made joint and several; and the mistake in the form by which it is made joint, is not in the agreement of the parties, but in the execution of it by the draftsman. The cases in which the general rule has been adhered to are, many of them, of a character which strongly test the principle upon which the rule itself is founded. Two or three only need be referred to. If the obligee, in a joint bond, by two or more, agree with one of the obligors to relieve him from his obligation, and does accordingly execute a release by which all the obligors are discharged at law, equity will not afford relief against this legal consequence, although the release was given under a manifest misapprehension of the legal effect of it in relation to the other obligors. So, in the case of Worral *v.* Jacob, 3 Merv. 271, where a person having a power of appointment and revocation, and, under a mistaken supposition that a deed might be altered or revoked, although no power of revocation had been reserved, executed the power of appointment without reserving a power of revocation; the court refused to relieve against the mistake.

The case of Lord Irnham *v.* Child, 1 Bro. C. C. 92, is a very strong one in support of the general rule, and closely *re- [*17] sembles the present in most of the material circumstances attending it. The object of the suit was to set up a clause containing a power of redemption in a deed granting an annuity which, it was said, had been agreed upon by the parties, but which, after deliberation, was excluded by consent, from a mistaken opinion that it would render the contracts usurious. The court, notwithstanding the omission manifestly proceeded upon a misapprehension of the parties as to the law, refused to relieve by establishing the rejected clause. It is not the intention of the court, in the case now under consideration, to lay it down that there may not be cases in which a court of equity will relieve against a plain mistake, arising from

ignorance of law. But we mean to say that where the parties, upon deliberation and advice, reject one species of security and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension and the insufficiency of such security, in consequence of a subsequent event not foreseen, perhaps, or thought of, direct a new security of a different character to be given, or decree that to be done which the parties supposed would have been effected by the instrument which was finally agreed upon.

If the court would not interfere in such a case, generally, much less would it do so in favor of one creditor, against the general creditors of an insolvent estate, whose equity is, at least, equal to that of the party seeking to obtain a preference, and who, in point of law, stand upon the same ground with himself. This is not a bill asking for a specific performance of an agreement to execute a valid deed for securing a debt; in which case the party asking relief would be entitled to a specific lien; and the court would consider the debtor as a trustee for the creditor of the property on which the security was agreed to be given. The agreement has been fully executed, and the only complaint is that the agreement itself was founded upon a misapprehension of the law, and the prayer is to be relieved against the consequences of such mistake. If all other difficulties were out of the way, the equity of the general creditors to be paid their debts equally with the plaintiff, would, we think, be sufficient to induce the court to leave the parties where the law has placed them.

The decree is to be affirmed, with costs.

12 P. 32; 4 H. 185; 9 H. 82.

DANIEL CARROLL, of Dudington, Plaintiff in Error, *v.* JOSHUA PEAKE, Defendant in Error.

1 P. 18.

If the execution of an original paper be admitted, and it is in the defendant's possession, a copy, in the defendant's handwriting, may be used in evidence without notice to produce the original.

If a bill of exceptions does not contain some paper offered in evidence and certified by the clerk below to have been accidentally lost, such lost paper will be presumed to contain what was necessary to support the judgment, if such a presumption is possible.

A general averment in a declaration, of readiness to perform an agreement to take a lease, is good after verdict.

THE case is stated in the opinion of the court.

Key and *Coxe*, for the plaintiff.

Jones, contrà.

TRIMBLE, J., delivered the opinion of the court. [20]

This is a writ of error to a judgment of the circuit court for the District of Columbia, held in the county of Washington.

Joshua Peake brought this action on the case in that court, upon a special agreement, against Daniel Carroll, who pleaded the general issue; and, upon the trial, a verdict and judgment were rendered for the plaintiff therein. A bill of exceptions was taken by the defendant in the court below; which states that the plaintiff, to support the issue on his part, offered to read in evidence to the jury the following copy of a paper, (the execution of the original of which was admitted,) signed by Joshua Peake, which copy is admitted to be wholly in the handwriting of the defendant, to wit: "I agree to rent of Daniel Carroll, of Dudington, the land rented heretofore to Wilfred Neale, the same being in St. Mary's county; for which I oblige myself to pay, on the 1st day of January, 1821, for one year, from the 1st day of January, 1820, six *hundred dol- [*21] lars, ($600,) and to pay all taxes on the same, independent of the above rent; and also oblige myself to keep the premises in good repair, and not to commit, nor suffer to be committed, any waste on the said premises.

"Witness my hand, this 11th day of December, 1819.

"It is agreed that the taxes shall be paid by Joshua Peake, and the said Carroll will allow the same, on the tax bill, receipted, out of the rent.

"Witness, JOSHUA PEAKE.

"WILLIAM DUDLEY DIGGES."

Which paper was so offered in evidence, in connection with three letters from defendant to the plaintiff, as a component part of the sum of evidence relied on to prove the contract as laid in the declaration; which letters are in these words and figures following, &c. [The letters were mislaid.]

To the reading of which paper the defendant, by his counsel, objected, as not being competent and legal evidence, to charge the defendant in this case; but the court permitted the said paper to be read in evidence to the jury, &c., to which opinion of the court, the defendant, by his counsel, excepted, &c. The plaintiff, then, further to support the issue on his part, offered in evidence to the jury the said letters from defendant to plaintiff, and admitted to be in the handwriting of the defendant, as component parts, in connection with the said paper before admitted, of the evidence of the agreement on which this action is founded; to the admission of said letters as part of said agreement, the defendant, by his counsel, objected; but the

court overruled said objection, and permitted said letters to be read to the jury as part of said agreement; to which opinion of the court the defendant, by his counsel, excepted.

It is insisted by the counsel for the plaintiff in error, that these opinions are erroneous; and that the judgment of the circuit court should, for that cause, be reversed.

The bill of exceptions does not put the objection to the paper offered in evidence distinctly upon the ground that, being a copy, it could not be used without timely notice to produce the original. Although some doubt exists whether the objection ought not to have been placed on that ground in the court below, in order to make it available here, yet, as the whole argument in this court has proceeded upon the assumption that the question is sufficiently raised upon the bill of exceptions, we will so consider it. The principle relied upon is, that a copy cannot be given in evidence if the original be

[*22] in the possession of the adverse party; unless timely *previous notice has been given him to produce it at the trial. This is certainly true as a general rule. But in examining the numerous adjudged cases to be found in the books, in which this general rule has been asserted and applied, we have been able to find no case like this. They are all cases where the copy offered had not been made by the party against whom it was attempted to be used. This is a case in which the execution of the original is distinctly admitted; and the paper called a copy is admitted to be wholly in the defendant's handwriting. From the nature of the transaction he was entitled to and must be presumed to have the custody of the original. The copy, made out by himself, must be presumed to have come to the plaintiff's possession by the defendant's own act; and, by making and delivering it to the plaintiff, the defendant consents that it shall be considered genuine and true. We think that, under such circumstances, this case forms a just exception to the general rule; and that it is not competent for the defendant below to allege against his own acts and admissions that this paper does not nor may not contain all the verity and certainty of the original. So far we have considered this paper as if it ought to be regarded in the light of a copy. But we think that is not its true character, as it was presented to the court and jury. We think that, under the circumstances, and to the purposes for which it was offered, it may fairly be regarded as an original.

As relates to Peake's contract to pay rent, &c., it was a copy; but was it a copy, as respects Carroll's agreement to let the farm? If so, it was a copy without an original; for the original paper was not signed by Carroll, and contained no contract on his part. The paper

was offered in evidence, in connection with the three letters from the defendant to the plaintiff, as a component part of the evidence, to prove the defendant's agreement to let the farm to the plaintiff, and the terms of that agreement. The clerk certifies that the letters referred to are not on file in the cause, and they are not transcribed into the record. In their absence, if there be a supposable case, in which they, and the paper called a copy, were legitimate evidence, regarding that paper as an original, and not as a mere copy, it must be so regarded. We are bound to presume every thing in favor of the correctness of the decision of the court below, until the contrary appears.

If the letters, which are admitted to be in the defendant's handwriting, were relevant to the matter in controversy, and in their absence that must be presumed, no doubt can exist of their being competent and legitimate evidence, to prove the contract sued on, so far as they spoke on that subject. It has been already remarked that the paper called a copy was *admitted to be [*23] in the defendant's handwriting, and that it must have come to the plaintiff's hands by the defendant's act. Let it be supposed, then, that having copied, in his own hand, Peake's agreement to pay rent, &c., he had inclosed that paper in one of those letters, and referred to it. The letter here stated that he (Carroll) agreed to let and lease the farm to Peake, upon terms expressed in the inclosed paper. It is plain that, in the case supposed, the inclosed paper, although it might be a mere copy, as respected Peake's part of the contract, yet, as respected the contract on Carroll's part, would be truly an original document, by adoption and incorporation with the letter, as much as the letter itself. It would be a part of the letter. We do not say the paper was thus inclosed and referred to in the letters, or either of them; but it might have been for aught that appears, and that is enough.

Upon the principle assumed as correct, that the opinion of the court below must be regarded as sound until its incorrectness is made to appear, the plaintiff in error cannot prevail, unless he can show, in the absence of the letters, that no case could have existed, they being present, in which the paper objected to could be considered in the light of an original document. The case first shows that such a case might have existed, and have been proved upon the trial. It is by no means a strange supposition to presume that such was the aspect of the case; for it is perfectly consistent with a known and familiar manner of transacting business, where the parties reside at a distance, or where, for other causes, the mode of contracting by correspondence is resorted to. It is objected that the declaration shows no cause of

action, and it is insisted the judgment shall be reversed for that cause. The declaration is very loosely drawn, and a great deal of matter is crowded into it which is impertinent, or, at most, only in aggravation of damages. But surplusage in pleadings does not vitiate in any case after verdict; and wholly disregarding the impertinent and irrelevant matter, the declaration contains enough to support the action. The declaration in substance alleges that the defendant below agreed to rent, and to farm-let to the plaintiff, the farm, for one year from the 1st of January, 1820, and agreed to remove the former tenant, and that the plaintiff should have the possession and occupancy of the farm from the 1st of January aforesaid, free from the let, hindrance, or disturbance of any one. The declaration then proceeds to aver, that on the said 1st of January, 1820, at the county aforesaid, the plaintiff was ready and willing, and offered to the said Daniel, (the defendant,) to take possession of the said land and farm, and to rent and occupy the same, &c., and afterwards assign

[*24] breaches (*inter alia*) in this, that *although specially requested so to do, on the said 1st day of January, 1820, the defendant refused and neglected to turn out the tenant who then was and had been in the possession and occupancy of the said land and farm, and to deliver the possession thereof to the said Joshua.

The specific objections urged in argument are, that the plaintiff should have averred his readiness, and offered his request; not on the 1st day of January generally, but at the last convenient hour of that day; and that instead of charging a personal demand, it ought to have been averred to have been made on the land. It must occur to every one that an offer and request upon the land, in the absen of the defendant, would be a very idle and useless ceremony, and that an offer and request to him personally was much better calculated to enable him to perform his duty and fulfil his agreement.

We cannot admit that it was necessary the offer and request should be made at the last convenient hour of the day. The strict doctrines contended for have been applied to special pleas in bar, of tender, and some others of a peculiar character, and depending upon their own particular reasons; but there is no analogy between them and this case.

In declarations general averments of readiness and request on the day, have always been held sufficient, especially after verdict.

We are of opinion there is no error in the judgment and proceedings of the circuit court, and the same is affirmed, with damages and costs.

13 P. 436; 7 H. 833; 9 H. 421; 11 H. 480.

THE PRESIDENT AND DIRECTORS OF THE BANK OF WASHINGTON, Plaintiffs in Error, *v.* PHILIP TRIPLETT AND CHRISTOPHER NEALE Trading under the Firm of TRIPLETT AND NEALE, Defendants in Error.

1 P. 25.

A bank which receives a bill for collection is the agent of the holder, not of another bank which merely transmits the bill for the holder, and is liable to the holder for a want of due diligence.

A time bill, not presented for acceptance, is not payable till the last day of grace.

The holder of a bill sent to a bank for collection, is bound by the settled usage of the banks of that place, as to the time of demanding payment. A time bill need not be presented for acceptance; and an omission thus to present it, or to apprise its owner that ineffectual inquiries have been made after the drawee, or failure to protest for non-acceptance, is not negligence in a bank holding it for collection, provided the bank acted, in those particulars, according to its settled usage.

THE case is stated in the opinion of the court.

Key, for the plaintiff.

Jones, contrà.

* MARSHALL, C. J., delivered the opinion of the court. [*28]

This is a writ of error to a judgment of the United States circuit court of the District of Columbia, for the county of Alexandria.

On the 19th of June, 1817, William H. Briscoe, of Alexandria, drew a bill on Peter A. Carnes, of Washington, payable four months after date, to the order of Triplett and Neale. The payees of the bill indorsed it in blank, and delivered it to the cashier of the Mechanics' Bank of Alexandria, for the purpose of being transmitted through the said bank to a bank in Washington, for collection.

The cashier of the Mechanics' Bank of Alexandria indorsed the bill, to the order of the cashier of the Bank of Washington, and transmitted it to him for collection in a *letter of the [*29] 19th of July, 1817. Neither of the banks had any interest in the bill.

The bill was protested for non-payment; and this suit was brought by Triplett and Neale, against the Bank of Washington, to recover its amount. The declaration charges that the bank did not use reasonable diligence to collect the money mentioned in the said bill, nor take the necessary measures to charge the drawer; but neglected to present the bill, either for acceptance or payment; and to have the same protested; whereby the plaintiffs have lost their recourse against the drawer.

It was proved, on the part of the bank, that either on the day the bill was received, or the succeeding day, one of its officers called with the bill at the house of the said Peter A. Carnes, for the purpose of presenting it for acceptance, and was told that he was in Baltimore. He called again three or four days afterwards, for the same purpose, and was again told that he was in Baltimore. These answers were reported to the cashier.

On the 9th of October, 1817, the cashier of the Mechanics' Bank of Alexandria addressed the following letter to the cashier of the Bank of Washington:—

"DEAR SIR: The holder of the draft on Peter A. Carnes, for $625.34, desires me to inform you that if the draft is not paid, to make the notary send a notice to P. A. Carnes, Baltimore, and likewise to W. H. Briscoe, Leesburg, provided it is not paid at his residence, in Washington."

On the 13th of the same month the cashier of the Bank of Washington, in answer to this letter, stated that the bill had not been accepted, because the drawee could not be found; and that the directions given in the letter of the 9th should be observed. On the 24th of October, the fourth day after that expressed on the face of the bill as the day of payment, it was protested for non-payment, and returned, under protest, to the Mechanics' Bank of Alexandria. Notice was given to the drawer, who has refused to pay the same.

On the trial, the counsel for the defendant moved the court to instruct the jury:—

1. That upon this evidence, if believed, the plaintiffs are not entitled to recover.

2. That the plaintiffs are not entitled to recover for any loss of recourse against Briscoe, the drawer of the said bill.

3. That the failure of the defendants, (after having called at the residence of the drawee of that said bill, to obtain his acceptance, and not finding him or any person there to accept it,) to notify
[*30] the drawer of the circumstance, was not *such negligence as discharged the said drawer from his liability on the said bill, and entitles the plaintiffs to recover.

4. That if they believed, from the evidence, that the defendants conformed to their former usage in regard to such bills as the one in question, in calling on the drawee for acceptance, (the said drawee being from home,) and not noting the same as dishonored, and giving notice thereof to the parties on the said bill; then their failure to treat the said bill as dishonored, and to give notice accordingly of

non-acceptance, did not discharge the drawer thereof from his liability to the plaintiffs.

The court refused to give either of these instructions; to which refusal the counsel for the defendants excepted; and a verdict and judgment were rendered for the plaintiffs.

The plaintiffs in error insist that the circuit court ought to have given the instructions first asked, because, 1st, no privity existed between the real holder of the bill and the Bank of Washington. That bank was not the agent of Triplett and Neale, but was the agent of the Mechanics' Bank of Alexandria. Some cases have been cited to show that if an agent employed to transact a particular business, engages another person to do it, that other person is not responsible to the principal. On this point, it is sufficient to say that these cases, however correctly they may have been decided, are inapplicable to the case at bar. The bill was not delivered to the Mechanics' Bank of Alexandria, for collection, but for transmission to some bank in Washington, to be collected. That bank would, of course, become the agent of the holder. By transmitting the bill, as directed, the Mechanics' Bank performed its duty, and the whole responsibility of collection devolved on the bank which received the bill for that purpose; the Mechanics' Bank was the mere channel through which Triplett and Neale transmitted the bill to the Bank of Washington.

The deposit of a bill in one bank, to be transmitted for collection, to another, is a common usage of great public convenience, the effect of which is well understood. This transaction was, unquestionably, of that character; and there is no reason for suspecting that the Bank of Washington did not so understand it. The duty of that bank was precisely the same, whoever might be the owner of the bill; and, if it was unwilling to undertake the collection, without precise information on the subject, that duty ought to have been declined. The custom to indorse a bill put in bank, for collection, is universal; and the Bank of Washington had no more reason for supposing that Triplett and Neale had ceased to be the real holders, from their indorsement, than for supposing that the *cashier of [*31] the bank of Washington had become the real holder, by the indorsement to them. It is the customary proceeding for collection in such cases, and is for the advantage of the party interested. At any rate, the letter of the 9th of October disclosed the real party entitled to the money; and the answer to that letter assumes the agency, if it had not been previously assumed. The court is decidedly of opinion that the Bank of Washington, by receiving the bill for collection, and, certainly, by its letter of the 13th of October, be-

came the agent of Triplett and Neale, and assumed the responsibility attached to that character.

The first prayer of the defendants, in the circuit court, being to instruct the jury that, upon the whole evidence, the plaintiff ought not to recover; if it might properly have been granted, in any case in which any testimony was offered, certainly ought not to have been granted if any possible construction of that testimony would support the action.

The liability of the bank for the bill placed in its hands for collection, undoubtedly depends on the question whether reasonable and due diligence has been used in the performance of its duty. To maintain the charge of negligence, the counsel for Triplett and Neale have alleged the failure to give notice of the non-acceptance of the bill, and the failure to demand payment in proper time. The counsel for the bank have brought the first question more distinctly into view, by a more definite instruction respecting it, which was afterwards asked; and its consideration will be deferred until that prayer shall be discussed; but the first must be disposed of, under the general prayer.

Unquestionably, by failing to demand payment in time, the bank would make the bill its own, and would become liable to Triplett and Neale for its amount. The inquiry, therefore, is into the fact.

The demand was made on the fourth day after that mentioned on the face of the bill as the day of payment.

The defendants in error insist that, if the bill was never presented for acceptance, payment ought to have been demanded on the day mentioned on its face. If this be not so, then it ought to have been demanded on the third day afterwards, which is the last day of grace.

The allowance of days of grace is a usage which pervades the whole commercial world. It is now universally understood to enter into every bill or note of a mercantile character, and to form so completely a part of the contract that the bill does not become due, in fact or in law, on the day mentioned on its face, but on the last day of grace. A demand of payment, previous to that day, will not authorize a protest, or charge the drawer of the bill.

[*32] *This is universally admitted, if the bill has been accepted.

If it has been noted for non-acceptance, but has been held up, it would not be protested for non-payment until the last day of grace. Why, then, should a bill never presented be demandable at an earlier day than if it had been accepted, or if acceptance had been refused? Whatever might have been the original motive for the

indulgence, it is now taken into consideration, both by the drawer and payee of the bill. The amount is, consequently, estimated on the calculation that it becomes really due on the last day of grace. Neither party can foresee, when the bill is drawn, whether it will be paid or not; nor, if it be payable after date, whether it will be presented or not. Their calculation, therefore, as to the day when it becomes really due and is to be paid, is independent of these considerations. No sufficient reason is perceived for the distinction.

It is, however, a law dependent on usage. The books which treat on the subject concur in saying that payment must be demanded when the bill falls due; and that it falls due on the last day of grace. The distinction between a bill which has and which has not been presented, has never been taken; and it is apparent that a bill is never drawn with a view to this distinction. The fact that the question has never been made, is a strong argument against it. The point has never, so far as we can find, been brought directly before a court; and we have seen only one case in which it has been even incidentally mentioned.

In Anderton *v.* Beck and Pearson, 16 East, 248, a bill was drawn, payable two months after date, and was not presented for acceptance. It was protested for non-payment, and a suit was brought by the holder against the drawer. He resisted the demand, and the opinion of the court proceeds on the admission that the bill fell due on the last day of grace. This case consists, we believe, with the opinions and practice of commercial towns.

But if a bill, payable after date, and not presented for acceptance, falls due on the same day as if it had been accepted, the defendants in error insist that payment ought to have been demanded on the last day of grace.

It was proved at the trial that the settled usage of the Bank of Washington, at that time, and of all the other banks in Washington and Georgetown, was, to demand payment on the day succeeding the last day of grace; and this usage, so far as respects notes negotiable in a particular bank, has been sanctioned by the decisions of this court. Renner *v.* The Bank of Columbia, 9 W. 582, was a suit brought in a circuit court of the District of Columbia, against the indorser of a * promissory note, which had been [* 33] negotiated in the Bank of Columbia. Payment was demanded, and the note protested on the fourth day after that mentioned in the note as the day on which it became payable. This was proved to have been in conformity with the custom of the bank; and the defendant moved the court to instruct the jury that the demand was not in time, and that the indorser was not liable for the note.

This instruction was refused, and the defendant brought the judgment into this court by writ of error. The judgment, on great deliberation, was affirmed.

In this case, the custom of the bank was known to the parties to the note. But the question arose afterwards, in a case in which the custom was not known to the parties. Mills *v.* The Bank of the United States, 11 W. 430, was a suit brought by the bank against the plaintiff in error and others, on a note indorsed by him and negotiated in the office of discount and deposit of the Bank of the United States, which was protested for non-payment on the day of the last day of grace.

It was proved at the trial, that this was according to the usage of that bank. The counsel for the defendant moved the court to instruct the jury that this usage could not bind the indorser, unless he had personal knowledge of it at the time he indorsed the note. The court refused to give the instruction, and the jury found a verdict for the bank, on which judgment was rendered. That judgment was brought before this court and affirmed. The court said that, "when a note is made payable or negotiable at a bank, whose invariable usage it is to demand payment, and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it or not."

In the case of such a note, the parties are presumed, by implication, to agree to be governed by the usage of the bank at which they have chosen to make the security itself negotiable.

These cases decide that under consideration, unless there be a distinction between a bill and a note made negotiable in a particular bank. In the case of a note negotiable in a particular bank, the parties may very fairly be presumed to be acquainted with the usage of that bank. As the decisions which have been cited depend upon that presumption, it will become necessary to inquire, how far the same presumption may be justified in the case of a bill drawn on a person residing in a place where this usage is established.

If a promissory note were made in the city of Washington, payable to a person residing in the same place, though not purporting to be payable and negotiable in bank, it would very probably be placed in a bank for collection. It is a common
[*34] *practice, and the parties would contemplate such an event as probable when the note was executed.

The same reason seems to exist for applying the usage of the bank to such a note as to one expressly made payable and negotiable in bank. Such notes are frequently discounted, and certainly the person who discounts them or places them in bank for collection

stands in precisely the same relation to the bank, as respects its usage, as if the notes purported on their face to be negotiable in bank. The maker of a negotiable paper, in such a case, may fairly be presumed to be acquainted with the customary law which governs that paper at his place of residence.

In the case at bar, however, the bill was drawn at Alexandria, on a person residing at Washington. Does this circumstance vary the law of the case?

The usage by which questions of this sort are governed, is different in different places. It varies from three to thirty days; and the usage of the place on which the bill is drawn, or where payment is to be demanded, uniformly regulates the number of days of grace which must be allowed. This bill being drawn on a person residing in Washington, and being protested for non-payment in the same place, is, according to the law merchant, to be governed by the usage of Washington. Could this be questioned, still the holder of the bill, who placed it, by his agent, in the Bank of Washington for collection, who has made that bank his agent, without special instructions, submits his bill to their established usage. The cases, then, which have been cited, are not different in principle from this; and payment having been demanded, according to the invariable usage of the bank, was demanded in time. If, then, the objections to the conduct of the bank were confined to the demand of payment and protest for non-payment, the first instruction asked by the defendants in the circuit court, ought to have been given. But they are not confined to the demand of payment and to the protest for non-payment. They extend to the steps taken by the bank, concerning the presentation of the bill.

The second instruction asked for is in terms which are, in some degree, equivocal. It may imply either that the recourse against the drawer of the bill was not lost, or that, if lost, that circumstance would not entitle the plaintiff to recover against the bank; as its decision is not essential to the cause, it will be passed over.

The third is more specific. The court is asked to say that the failure of the bank to give notice to the drawer that the drawee was not found at home, when called upon to accept the
*bill, is not such negligence as discharged the drawer from [*35]
his liability, and entitles the plaintiff to recover.

The question suggested by this prayer is one on which no decision is found in the books. It depends on analogy, so far as it is to be decided by adjudged cases. Such a bill need not be presented; but if presented, and acceptance be refused, it is dishonored, and notice must be given. Had the bank taken no step whatever to obtain an

acceptance, no violation of duty would, according to these decisions, have been committed. Can any unsuccessful attempt to do that which the law does not require, place the agent in the same situation that he would have stood in had the drawee been found, and had positively refused acceptance? Absence from home, with a failure to make provision for payment when a bill becomes due, is a failure to pay; but absence from home when the holder of a bill or his agent offers it for acceptance, is in no respect culpable. Had the drawee received advice of the bill, he could not have known that it would be presented for acceptance, because the law did not require it, and is consequently not blamable for his absence when the officers of the bank came to present it for acceptance. Had the bill, under such circumstances, been protested for non-acceptance, and returned, the drawer might not have been liable for it.

The bill, then, on general principles, ought not to have been protested; and the absence of the drawee ought not to be considered as equivalent to his refusal to accept. It might have been a prudent precaution to have given information that the bill was not accepted, because the drawer had not been found; but we cannot say that the omission would subject the agent to loss, unless such was the special usage of this bank.

4. The fourth prayer is for an instruction to the jury, that, if they believe, from the evidence, that the defendants conformed to their former usage, in regard to such bills, in calling on the drawee for acceptance, (the said drawee being from home,) and not noting the same as dishonored, and giving notice thereof to the parties on the said bill, then their failure to treat the said bill as dishonored, and to give notice accordingly, of non-acceptance, did not discharge the drawer thereof from his liability to the plaintiff.

The court has already indicated the opinion that this omission to treat the bill as dishonored, in consequence of not finding the drawee at home, if the usage of the bank was not to notice such a circumstance, did not discharge the drawer; consequently, this instruction ought to have been given, unless it should be supposed foreign to the case in which it was asked. In a suit brought by the [*36] holder against the bank, the *court was not bound to declare the law as between the holder and the drawer, unless the liability of the bank was determined by the liability of the drawer. Although, in the general, the one question depends on the other, yet it may not be universally so. The bank was the agent of the holder, not of the drawer, and might consequently so act as to discharge the drawer without becoming liable to its principal. In this case, however, as the agent received no specific instructions, but

was left to act according to the law merchant, a course of proceeding which did not discharge the drawer, could not render the agent liable to the principal. This prayer was, therefore, essentially the same with that which preceded it, with this difference. The third prays an instruction, whatever might be the usage of the bank; the fourth prays essentially the same instruction, provided the conduct of the bank conformed to its usage. This instruction, therefore, ought to have been given as prayed. Upon a review of the whole case, the court is of opinion that, if the bank acted in conformity with its established usage, in not noting the bill, and giving notice thereof, when the ineffectual attempt was made to present it for acceptance, this action could not be supported. With respect to this usage, the testimony is contradictory, and ought to have been submitted to the jury, in conformity with the last prayer made by the counsel for the bank. The court erred in not giving this instruction as prayed. The judgment, therefore, is to be reversed, and the case remanded for a new trial.

This cause came on, &c., on consideration whereof, this court is of opinion that the circuit court erred in refusing to instruct the jury, that if they believed that the defendants conformed to their former usage, in regard to such bills as the one in question, in calling on the drawee for acceptance, (the said drawee being from home,) and not noting the same as dishonored, and giving notice thereof to the parties on the said bill, then, their failure to treat the said bill as dishonored, and to give notice accordingly of non-acceptance, did not discharge the drawer thereof from his liability to the plaintiffs. It is therefore considered by the court that the said judgment be reversed and annulled, and that the cause be remanded to the said circuit court, with directions to award a *venire facias de novo*, and to proceed therein according to law.

6 P. 8; 14 P. 318; 4 H. 317.

GEORGE R. GAITHER, Plaintiff in Error, *v.* THE FARMERS AND MECHANICS' BANK OF GEORGETOWN, (for the use of Thomas Corcoran,) Defendants in Error.

1 P. 37.

If a valid promissory note of a third person be indorsed to secure, collaterally, an usurious loan, no action can be sustained upon it by the indorsee against the maker, even if the usurious loan has been paid.

THE case is stated in the opinion of the court.

Taylor and *Key*, for the plaintiff.

Jones and *Coxe*, contrà.

[*41] *JOHNSON, J., delivered the opinion of the court.

The plaintiff here was defendant in the court below, to an action instituted by the Farmers and Mechanics' Bank of Georgetown, on a note made by him to W. W. Corcorran and Co. and by them indorsed in blank to the bank.

The record makes out a case for this court, of which the following is a summary: That W. W. Corcorran and Co. discounted their own notes with this bank, at thirty days; the bank expressly stipulating, that in lieu of money they should receive what they call a post note of their own, payable at a future day, without interest. The evidence would make out that the post notes given for this discounted note, were at thirty-five days after date; that is, two days after the discounted note fell due; so that in fact there was no advance of money, although an interest of six per cent. per annum was taken from the Corcorrans, and the post notes of the bank were proved to be at a discount of one per cent., making one and a half per cent. for thirty days, or eighteen per cent. per annum. The note on which this suit was instituted was passed to the bank, as a collateral security for the discounted note, and was altogether
[*42] unaffected with *usury in its origin. The ground on which the right of the bank is resisted is, not that Gaither is discharged from his contract with W. W. Corcorran and Co., but that the indorsement to the plaintiff below, having been made to secure a note given on an usurious contract, could vest no interest or cause of action in the indorsee. In order to avoid the pressure of this defence in the court below, the plaintiffs there gave in evidence a writing, addressed by W. W. Corcorran and Co. to the bank, bearing date 17th February, 1823, prior to the institution of that suit, in these words: " Please deliver to Thomas Corcorran what notes of ours may remain in your possession, after the debt due the bank, for which they are left as collateral security, shall have been paid, or hold the same subject to his order." And it was further shown that a few days before the issue was tried below, an adjustment had taken place between the bank and Thomas Corcorran, (who was then indorser and assignee of W. W. Corcorran and Co.) upon which Gaither's note had been delivered to Thomas Corcorran; he then indorsed his name on Gaither's note, below that of W. W. Corcorran and Co., and thereupon the bank, before the jury were charged, had the name of Thomas Corcorran entered on the docket, as the *cestui que use*, for whom they were prosecuting their suit, and the jury, it appears, were charged with the cause, according to the exhibition of parties thus made upon the docket; that is, to try an issue between the bank, to the use of Thomas Corcorran, plaintiff, and Gaither, defendant.

This practice is familiar with the Maryland courts, and when the action originates in that form, the *cestui que use* is regarded as the real party to the suit.

It is now contended that, although substituted at the eleventh hour, Thomas Corcorran is to be regarded in that relation; and under that idea this cause has been argued, as though the question of usury had been raised between Gaither and an innocent indorser.

But it is obviously impossible, in the present action, to pay any regard to Thomas Corcorran's interest or claims. The arrangement which introduced his name into the cause, was too obviously concocted for the purpose of rescuing the interests of the plaintiffs in the record, from the effects of the defence of usury. It therefore can pretend to no merit in the administration of justice. But if the effects of that transaction be examined, without reference to the motive, it is equally clear it can have no bearing upon the present action. The interest in or power over Gaither's note, was only inchoate and contingent, until all the debts due the bank should be paid, or they otherwise be induced to relinquish it to him;
and this did *not take place until long posterior to the in- [*43]
stitution of the suit, and even after issue joined.

The bank sue on their own interest, declared on their own right, and acknowledge no participation with Thomas Corcorran in the interest or the action, until the moment when the cause is going to trial. It was surely then too late to permit them to assume a new character or interpose a new party, however liberally this court might be disposed to sacrifice the forms and rules of law to the Maryland practice.

We will, therefore, put Thomas Corcorran's interest out of view, and will consider the parties, at the commencement of the action, as the parties at its close.

This puts the question on the right of an innocent indorser out of the cause, since the indorsee of Gaither's note received the usurious interest, and the indorser paid it. The only questions on the point of usury, then, are,

1. Whether Gaither, in the relations in which he stood to these parties, could set up the usury in his defence.

2. And whether that defence could be set up, after payment of the note on which the usury had been received.

The objection in the first point is that, as there was no usury in the concoction of Gaither's contract, he ought not to be permitted to avail himself of the usurious contract between the indorser and indorsee, to avoid a debt which he justly owes.

And this is unquestionably true; for the rule cannot be doubted,

that if the note be free from usury, in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury. Nor does Gaither propose, by this defence, to relieve himself from paying the note; it goes only to his liability to pay it to this individual; and reason, analogy, and adjudged cases will sustain the defence. Suppose a note given to a woman, who marries, and then indorses it without her husband's authority; such indorsement would be void; 1 East, 432, and the indorsee could not recover, yet the husband and wife may recover.

In a comment on the case of Jones and Davison, in Holt's Reports, 1 Holt, 256, an usurious note is likened to a bill of exchange on a bad stamp. If a stamp were necessary to give validity to an indorsement, it cannot be doubted that none who claim through such an indorsement could maintain an action against the drawer. The indorsement, though actual, was ineffectual for the purpose of transferring an interest in the note. It was a void act.

This case is governed by the laws of Maryland: and the Act of Maryland against usury is in the words of the statute of
[*44] Ann. It declares, "All bonds, contracts, and *assurances whatever, taken on an usurious contract," to be utterly void. Now the indorsement of a negotiable note creates several contracts; and if, in this case, it could give a right of action against Gaither, the drawer, it ought also to sustain an action against W. W. Corcorran and Co. the indorsers; but against them, it is perfectly clear that an action could not be maintained, for they were parties to the usurious loan. It follows that their indorsement was a void act, and the property, and of consequence the right of action, never passed to these plaintiffs. — There is a very strong case on this subject, which we believe was not quoted in argument, to be found in the books to which we usually refer. We mean the case of Harrison and Hamell, in Taunton's Reports, (5 Taunt. 780,) in which the rights of a collateral surety to avail himself of usury in the original transaction, is distinctly recognized, when the contract of the collateral was wholly unaffected by usury. The case was reserved for argument, and the whole court concurred in the legality of the defence. The language of the judges is strong, and applies to the case before us. One of them remarks: "That if a man lends 1,000 pounds on an usurious interest, and gets from a third person a collateral security for 800 pounds only, without usurious interest, I hold that bond is void, not because it is given for securing usurious interest, but because it is given for enforcing a contract for usurious interest." And another says: "That, if giving these collateral acceptances would alter the case, it would be a shift or device by which the statutes of usury would be defeated."

With regard to the second point, it is necessary to see the force of the argument which would deduce from the payment of the discounted note, a cure to the taint with which the contract of indorsement was affected. The law declares it absolutely void. By what operation, then, is it to be rendered valid by the payment of the discounted note? It is argued, by the payment and extinguishment of the latter note, the usury is extinct, and as if it had never existed. We cannot perceive how this reasoning can prevail, either in point of fact or inference. In point of fact, the crime was only consummated by the payment of that note, since the bank thereby incurred a liability under the statute, to be sued for three times the sum paid them; and as to the inference, it seems very difficult to conceive how the payment of the usurious note should operate to confirm or give birth to a contract which the law declares never had existence, and was *ab initio*, utterly null and void. There have been cases in which usurious contracts have been cancelled, the usury refunded, and new contracts substituted free from the taint of usury; and the law gives to the offender this *locus penitentiæ*. But there is no analogy between such a transaction and that here presented, in [*45] which the money loaned has been paid by the borrower, and only passed into the vaults of the bank, to be deposited with the usurious interest previously taken. We have not heard of the refunding of this usury; and this, at least, would have been indispensable to removing the taint. But even that would never have given validity to an indorsement, which, in the eye of the law, was as though it had never existed.

As the decision on this point disposes of the right of action, and leaves no probability that the cause will be again brought up to this court, we deem it unnecessary to notice any other of the points made in argument.

The judgment was reversed, and the cause remanded to the circuit court, with directions to award a *venire facias de novo*.

7 P. 103.

GEORGE MINOR, PHILIP H. MINOR, DANIEL MINOR, WILLIAM MINOR, and SMITH MINOR, Plaintiffs in Error, *v.* THE MECHANICS' BANK OF ALEXANDRIA, Defendants in Error.

1 P. 46.

The subscription of the whole amount of the capital stock of a bank is not a condition precedent to its corporate existence, unless made so by the terms of its charter.

A replication to a plea of general performance, in an action on a bond, should assign a special breach; but, after verdict, the omission to do so cannot be taken advantage of.

If a cashier, on leaving his office, fail to pay over or account to the bank for any part of the moneys of the bank received by him, the presumption is that he wilfully wasted or misapplied them, and the burden is on him or his suretics to show the contrary.

A condition of a cashier's bond, "well and truly to execute the duties of cashier," includes not only honesty, but reasonable skill and diligence.

A usage of the board of directors, to permit the cashier to misapply the funds of the bank, cannot exonerate his sureties.

The cashier's bond, in this case, was held to cover all defaults in duties, from time to time annexed to the office, by those having the control of the bank.

The question, whether a *nolle prosequi* may be entered against one or more defendants, in an action on a joint and several bond, is a matter of practice, to be decided upon considerations of policy and convenience.

The defendants having severed in their pleadings, and no right to contribution being affected, a *nolle prosequi* entered after judgment against the sureties, as to the principal obligor, was held regular.

THE substance of the pleadings and of the exceptions is stated in the opinion of the court. The condition of the joint and several bond declared on was as follows: "Whereas the above-bound Philip H. Minor hath been duly elected to the office of cashier of the Mechanics' Bank of Alexandria, the conditions of the above obligation are such, that, if the above-bound Philip H. Minor shall well and truly execute the duties of cashier of the Mechanics' Bank of Alexandria, then this obligation to be void, but otherwise shall remain in full force and virtue in law."

The sureties severed from the principal in their pleas, and judgment was given against them before the principal had appeared. After he had appeared and pleaded severally, a *nolle prosequi* was entered as to him.

Taylor and *Jones*, for the plaintiffs.

Swann and *Wirt*, (attorney-general,) contrà.

[*62] *STORY, J., delivered the opinion of the court.

This is a writ of error to the circuit court of the district of Columbia, sitting at Alexandria. The plaintiffs in error were original defendants in the cause, and the suit is now before this court upon the judgment of the court below, upon certain pleas of the defendants, to which there was a demurrer; and also upon the instructions given and refused by the court, upon the trial of certain issues of fact, joined by the parties.

The action is debt upon an official bond, given by Philip H. Minor, cashier of the bank, and by four other persons, as his sureties, with condition that Minor "shall well and truly execute the duties of cashier" of the bank, and was originally brought against all the parties to the bond. The declaration proceeds for the penalty of the

bond, without any notice of the condition, and avers, by way of breach, the non-payment of the penalty. The sureties, after *oyer* of the bond and condition, (which thereby became part of the declaration,) severed themselves from the principal, and pleaded nine several pleas. To the first two of these pleas, demurrers were put in; and the court below, upon consideration, gave judgment upon the demurrers in favor of the bank; and the correctness of this decision constitutes the first subject of inquiry.

Exceptions have been taken, both to the matter and the form of these pleas; and if the matter of them, or either of them, might constitute a good bar to the action, it may then be necessary to consider whether that matter is pleaded with due propriety and certainty, according to the established rules of pleading, so as to escape objection upon general demurrer. Both of them are, in effect, though not in form, special pleas of *nul tiel* corporation. The first plea, in substance, avers that, by the charter granted by the act of congress of the 16th of May, 1812, c. 87,[1] the capital stock of the bank was, by the charter, fixed and limited to consist of $500,000, *bonâ fide;* that the whole capital stock was not *bonâ fide* filled up and subscribed for; but, on the contrary, by a collusion between the commissioners under whose direction the subscriptions were taken and the subscribers, a large portion of the capital stock, to wit, 18,000 shares, amounting to $180,000, were filled up by false and colorable subscriptions; the ostensible subscribers, after payment of the first instalments, were fraudulently permitted to withdraw the same, and future payments by them were dispensed with, while they were still rated and held out as stockholders, for the purpose of colorably * filling up the subscription of the whole capital stock, [* 63] and electing a board of directors; and that, in this manner and by these means, and by no other, the bank was put into operation.

This plea is meant to rest upon two grounds to sustain its legal propriety. First, that the subscription of the whole capital stock of $500,000 was a condition precedent to the putting of the bank into operation as a corporation. Secondly, that the collusion between the commissioners and the subscribers for the 18,000 shares, being fraudulent, made their subscriptions a mere nullity.

Various answers have been given at the bar to the legal sufficiency of the matters thus pleaded. In the first place, it is said that the defendants are estopped, by the bond, to deny the legal existence of the corporation. In the next place, that the charter does not make the subscription of the whole capital stock a condition precedent to

[1] 2 Stats. at Large, 735.

the establishment of the bank. In the next place, that the question whether the bank was regularly and *bonâ fide* put into operation, is matter not inquirable into in a suit of this nature, but only upon a *quo warranto*, instituted by the government. And, in the last place, that the whole stock being in fact subscribed, the fraudulent intention and acts of the parties did not make the subscription of the 18,000 shares a nullity. Let us, then, consider what is the true construction of the charter itself, upon the points raised at the argument, supposing it to have been (which in terms it is not) incorporated into the plea, and therefore judicially before us. The 1st section of the act of the 16th of May, 1812, c. 87, provides: "That the subscribers to the Mechanics' Bank of Alexandria, their successors and assigns, shall be and hereby are created and made a body politic, by the name and style of the Mechanics' Bank of Alexandria; and by such name and style shall be and are hereby made able and capable in law, to have, purchase, &c., lands, &c., &c., and the same to sell, &c., to sue and be sued, &c., &c.; subject to the rules, regulations, restrictions, limitations, and provisions hereinafter prescribed and declared."

In this section, there is no limitation as to the number of the subscribers necessary to constitute the corporation. The subscribers, whether many or few, are declared to be incorporated; and, unless there be some restriction or limitation elsewhere in the act, it is most manifest that the court cannot intend that any particular amount of subscriptions is indispensable.

The 2d section provides: "That the capital stock of said corporation may consist of $500,000, divided into shares of ten dol-
[* 64] lars each, and shall be paid in the following manner: * that is to say, one dollar on each share at the time of subscribing, one dollar on each share at sixty days, and one dollar on each share ninety days after the time of subscribing; the remainder to be called for as the president and directors may deem proper, provided they do not call for any payment in less than thirty days, nor for more than one dollar on each share at any one time." The argument of the defendants is, that "may," in this section, means "must;" and reliance is placed upon a well-known rule in the construction of public statutes, where the word "may" is often construed as imperative. Without question, such a construction is proper in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject, further than that that exposition ought to be adopted in this as in other cases, which carries into effect the true intent and object of the legislature in the

enactment. The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions. Now, we cannot say that there is any leading object in this charter, which will be defeated by construing the word "may" in its common sense, as imparting a power to extend the capital stock to $500,000, and not an obligation that it shall be that sum and none other. It is by no means clear, from this section, that the legislature contemplated that there should be a capital of $500,000, on which the bank was to commence or carry on its operations. On the contrary, three instalments only are required to be absolutely paid in, and the residue of the capital stock is to be paid in only when the president and directors may deem it proper; so that the capital stock, except at the discretion of the board, may never extend beyond the amount of $150,000, for any practical purposes, either as security to the public or as the basis of discounts. Now, the plea itself does not attempt to deny that all but 18,000 shares of the stock were *bonâ fide* subscribed for; so that, for aught that appears, the capital stock on which the bank carried on its operation may have far exceeded that sum. It has been urged, that public policy requires such an imperative construction of the clause for the public security. But it is a sufficient answer to that suggestion, that no such public policy is avowed or can be inferred from the general terms of the act. When the legislature intends to restrict the capital stock of a bank, or to require any portion of stock or stockholders to be indispensable for its legal existence and operations, it is not uncommon to incorporate such a restriction into the charter. The omission to do so is quite as significant * that [* 65] the legislature did not deem such a restriction subservient to any manifest public policy.

The legislature might well presume, after prescribing the maximum to which the capital stock should extend, that the actual capital to be employed might safely be left to the discretion of the stockholders, or its agents. The 13th section of the charter contains provisions for the security of the public against over-issues by the bank, and if any such restriction had been intended, as the argument supposes, it would naturally have found a place. It declares that no stockholder shall be answerable for any losses, deficiencies, or failure of the capital stock, for any larger sum than the amount of the stock belonging to him; excepting that if the total amount of the debt of the bank shall exceed twice the amount of its capital stock, over and above deposits, then the directors shall, in their private capacities, be liable for the excess; and if the directors shall not have property to pay the amount of the excess, then every stockholder shall be liable for their

deficiencies, in proportion to their shares in the bank. Whether, therefore, the capital stock be great or small, if there be debts due from the bank exceeding twice the amount of the capital stock, which may fairly be construed to mean the capital stock actually paid in, the stockholders become ultimately liable for the excess; and this liability furnishes, if not an ample, at least a reasonable security against the public evils which the argument supposes might result from not requiring the whole capital to be subscribed for. At all events, we cannot perceive any clear legislative intention to make the subscription of the whole capital stock a condition precedent to the corporate existence of the bank, and unless it is so made by the charter, the matter of the plea falls, and cannot sustain the defence.

If, however, this interpretation of the charter could not be supported, and the subscription of the whole capital stock were a condition precedent, the result, so far as the first plea goes, would not be varied. The fraud and collusion asserted in that plea, if admitted in its fullest manner, does not lead to the conclusion which it seeks to establish. If the subscription were fraudulently made with a view to evade the provisions of the charter, the law will hold the parties bound by their subscriptions, and compellable to comply with all the terms and responsibilities imposed upon them, in the same manner as if they were *bonâ fide* subscribers. It will not make the subscription itself a nullity, but it will deprive the subscribers of the power of availing themselves of the same. The 3d section of the act manifestly contemplates cases of fraudulent subscription, and provides

"that all the subscriptions and shares obtained in conse-
[*66] quence thereof shall be *deemed and held to be for the sole and exclusive use and benefit of the persons subscribing, or in whose behalf the subscriptions respectively shall be declared to be made, at the time of making the same; and all bargains, contracts, promises, agreements, and engagements, in anywise contravening this provision, shall be void; and the person, &c., subscribing, &c., shall have, enjoy, and receive the share or shares respectively, &c., and all the interest and emoluments thence arising, as freely, fully, and absolutely as if they had severally and respectively paid the consideration therefor; any such bargain, &c., to the contrary notwithstanding."

This section seems to us conclusive upon the point. It avoids all bargains contravening the provisions in respect to subscriptions, and gives to the subscriptions the same effect as if they were *bonâ fide* made for the real use and benefit of the subscribers; and independently of this provision, it would be extremely difficult to maintain, upon general principles of law, that a private fraud between the

original subscribers and commissioners could be permitted to be set up, to the injury of subsequent purchasers of the stock, who became *bonâ fide* holders, without any participation or notice of the fraud.

For these reasons, we are of opinion that the matter of the first plea, even if it had been well pleaded, would constitute no bar to the action.

The second plea is disposed of by the construction of the charter already intimated, and is further open to fatal objections from its deficiency of proper averments and want of legal certainty. It makes no averment of the amount of the capital stock, or of the necessity of the whole being subscribed for before the bank is to be put in operation.

It asserts no fraudulent combination or subscription; but in the most general terms, without any certainty as to facts or circumstances, alleges that the capital stock was not filled up by any subscription, opened and conducted in pursuance of the act, so as to entitle the subscribers to bring the action; and that the subscribers did unjustly and unlawfully arrogate to themselves the corporate name, style, and privileges, without the capital stock having been filled up by subscription, or the corporation having been constituted and composed of actual subscribers, pursuant to the directions of the act. In point of substance, as well as form it is bad, upon the established rules of pleading.

This view of the case renders it wholly unnecessary to consider the point made as to the estoppel and the necessity of a *quo warranto;* on which, therefore, we give no opinion.

The third and fourth pleas are intended to be pleas of general performance; the third is so, in fact, and pursues the condition of the bond. The fourth is argumentative, and assumes a [*67] particular legal interpretation of the condition; that is to say, that the condition covers only wilful defaults and breaches of duty, and is no security for competent skill and reasonable diligence in the discharge of duty, but only for honesty. To these pleas special replications were filed, assigning special breaches of duty, upon which the parties were at issue, and upon this and all the other issues in the cause the jury returned a verdict for the plaintiffs. No exception has been taken to the sufficiency of these replications.

The fifth plea states a general performance of duty, in obedience to and in pursuance of the "directions, rules, orders, usages, and customs of trade and business, ordained, established, and practised in the said bank, by the authority of the said president and directors." It is, therefore, argumentative, and supposes that compliance with the rules, orders, usages, &c., established and practised by the president and directors, whatever they may be, whether within the scope of

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their power or not, would be a good and true discharge of duty. To this plea a general replication was put in, "that the said cause of action, in the declaration mentioned, did accrue, as in the said declaration and breaches are set forth, without this, that the matters set forth in the said plea are true," and this the plaintiffs pray may be inquired of by the country; and the defendants joined in the issue; upon which a verdict was found in favor of the plaintiffs. An exception has been taken at the argument to this replication, upon the ground that it ought to have assigned a special breach, and that the omission is not cured by the verdict. There is no question that the replication is not drawn with technical accuracy and correctness; and if the plea be a good plea of general performance, it is clear, both upon principle and authority, that a special breach ought to have been assigned in the replication; and the objection, if insisted upon by way of demurrer, for that cause, would have been insuperable. The reason is, that the law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. A covenant or condition for general performance is broken by any single omission of duty, and no inconvenience can arise from stating the particular breach with suitable certainty. But it does not follow that, if not so stated, the objection may be taken in any stage of the suit. The rule as to certainty in pleadings is framed for the benefit of the parties, and may be waived by them, and in many cases, both at common law and by the statute of *jeofails*, defects in this particular are cured
[*68] by a verdict. It is true, that in *a declaration upon a covenant for general performance of duty, if no breach be assigned, or a breach which is bad, as not being in point of law within the scope of the covenant, the defect is fatal, even after verdict. Com. Dig. Plead. 14. But that is not the present case. Here the declaration does assign a good breach, by the non-payment of the penal sum stated in the bond. The defendants disclose the condition of the bond upon oyer, and set up a general performance of it; and the replication, though inartificially drawn, puts in issue the whole matter of the defence, and denies the performance of it. The verdict has found that the condition was not performed, and consequently, upon the whole record, the non-payment of the penal sum is admitted, and the excuse for it is negatived. The replication, then, does assert a breach, though in too general a form. It ought to have assigned a special breach; but the general breach includes it, and the verdict having found the general breach, there is, upon principle, no reason shown against the plaintiff's right of recovery.

It is exactly like the case of a declaration upon a general covenant of the like nature, where a particular breach ought to be assigned; and yet, if a general breach be assigned, the defect is cured by a verdict for the plaintiff. Com. Dig. Plead. 48. The objection, then, to the replication to the fifth plea cannot now be sustained.

It is not necessary to notice the remaining pleas upon which issues were joined, because a verdict has been found in all of them in favor of the plaintiffs, however liable to objection some of them may be, and particularly the seventh plea of *non damnificatus*, as an answer to the declaration. They set up special defences, and the plaintiffs were not bound to do more than traverse them.

The instructions of the court, given and refused at the trial, constitutes the next subject of inquiry. It is conceded that if the instructions given on the prayer of the plaintiffs were correct, as to the issues on the third and fourth pleas, the qualifications annexed to them by the court in their applications to the other issues, were perfectly proper.

The first instruction is, in substance, that if Minor, upon his leaving the bank, failed to pay over or to account to the bank for any portion of the moneys of the bank received by him as cashier, then the jury may and ought to infer that the moneys so unaccounted for were wilfully wasted by Minor, or applied to his own use; and under such circumstances, the defendants are liable for the same. We can perceive no error in this instruction; the presumption of a wilful waste or misapplication of the funds of the bank by the cashier, was a natural conclusion from his failure to pay over or [* 69] account for the same. It was not put to the jury as a presumption incapable of being rebutted by evidence showing a loss by negligence or accident. If such a loss actually occurred, it was incumbent on the cashier to prove it, and his total omission to offer any such proof, which, from the nature of the case, must be more within his own power than that of the bank, ought to lead the jury to the presumption of the non-existence of any such negligence or accidental loss.

It has been argued that this instruction is the more material and injurious to the defendants because it proceeds in the latter part upon a misconstruction of the true import of the condition of the bond. The condition that Minor shall "well and truly execute the duties of cashier" of the bank, is said to be merely a stipulation for honesty in the discharge of the duties, and not for skill, capacity, or diligence. We are of a different opinion. "Well and truly to execute the duties of the office," includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskilfully,

if they are violated from want of capacity or want of care, they can never be said to be "well and truly executed." The operations of a bank require diligence, with fitness and capacity, as well as honesty, in its cashier; and the security for the faithful discharge of his duties would be utterly illusory if we were to narrow down its import to a guaranty against personal fraud only.

The remarks already made dispose of the second and third instructions prayed for by the plaintiffs. These instructions, in substance, declare that the sureties are liable upon the bond for any wilful or permissive misapplication of the moneys of the bank, which the cashier knowingly made or suffered without authority, whereby the same moneys have been lost to the bank. There seems no ground upon which to rest any reasonable objection to such a direction to the jury.

We may now proceed to the consideration of the three instructions prayed for in behalf of the defendants. The first is, in substance, that if it were the established usage and practice of the bank that the cashier might, in his discretion, permit customers to overdraw, and to have checks and notes charged up without present funds in the bank; and for the cashier to receive and pass, as cash, checks and drafts upon other banks; and if the balances appearing against such persons, charged in the books of the bank, arose out of the exercise of such discretion by the cashier, in the course of the ordinary transactions of the bank, and pursuant to the established usage and course of business there adopted, and generally known to the president and directors, practised and continued with their knowledge for a series of years, from the commencement of the bank to the termi-
[*70] nation *of Minor's cashiership, though the existence of such balances, or the particular circumstances attending them, were not formally communicated to the board of directors, the jury may infer the approbation, assent, and acquiescence of the president and directors, as to such usage and course of business.

The refusal of this instruction is matter of no small embarrassment and difficulty to this court, from the terms in which it is couched, and the issues on the sixth, eighth, and ninth pleas, to which alone it can be properly applied. Those issues put to the jury the question whether the acts of the cashier, whatever might be their character or kind, were or were not done by the wrong, connivance, and permission of the president and directors of the bank. The point of the instruction is, that the established usage and practice of the bank for a long period, known to the president and directors, does afford a presumption of the approbation, assent, and acquiescence of the president and directors, as to such usage and practice, though the balances

resulting therefrom were not formally communicated to the directors. From the shape of the prayer, it is undoubtedly meant that such usage and practice was known to the president and directors as a board, and in their official character, and received their approbation as such. In a general view, with reference to the principles of the law of evidence, we are not prepared to admit that such a presumption could not ordinarily arise. The ordinary usage and practice of a bank, in the absence of counter proof, must be supposed to result from the regulations prescribed by the board of directors, to whom the charter and by-laws submit the general management of the bank and the control and direction of its officers. It would be not only inconvenient, but perilous, for the customers or any other persons dealing with the bank, to transact their business with the officers upon any other presumption. The officers of the bank are held out to the public as having authority to act according to the general usage, practice, and course of their business; and their acts, within the scope of such usage, practice, and course of business would, in general, bind the bank in favor of third persons possessing no other knowledge. In the case of the Bank of the United States *v.* Dandridge, 12 W. 64, the subject was under the consideration of this court, and circumstances far less cogent than the present to found a presumption of the official acts of the board were yet deemed sufficient to justify their being laid before the jury, to raise such a presumption. If, therefore, the usage and practice alluded to in the instruction were within the legitimate authority of the board, and such as its written vote might justify, there would be no question in this court that it ought to have been given.

* The pertinency of such a presumption to these issues [*71] cannot admit of dispute. But the real difficulty remains to be stated. Assuming that the court, upon these issues, ought to have given the instruction prayed for, the question is whether, upon the whole record, that is such an error as now justifies this court in a reversal of the judgment. If the instruction had been given, and thereupon a verdict upon these issues had been found for the defendants, could any judgment have been given upon these issues in favor of the defendants? or ought the judgment, *non obstante veredicto*, to have been for the plaintiffs? If it ought, then the error becomes wholly immaterial, since in no event could the instruction, in point of law, have benefited the defendants. Upon deliberate consideration, we are of opinion that the pleas on which these issues are founded are substantially bad. They set up a defence for the cashier that his omission "well and truly to perform" the duties of cashier was by the wrong, connivance, and permission of the board of direc-

tors. The question then comes to this, whether any act or vote of the board of directors, in violation of their own duties and in fraud of the rights and interest of the stockholders of the bank, could amount to a justification of the cashier, who was a *particeps criminis*.

We are of opinion that it could not. However broad and general the powers of the direction may be for the government and management of the concerns of the bank, by the general language of the charter and by-laws, those powers are not unlimited, but must receive a rational exposition. It cannot be pretended that the board could, by a vote, authorize the cashier to plunder the funds of the bank, or to cheat the stockholders of their interest therein. No vote could authorize the directors to divide among themselves the capital stock, or justify the officers of the bank in an avowed embezzlement of its funds. The cases put are strong, but they demonstrate the principle only in a more forcible manner. Every act of fraud, every known departure from duty, by the board, in connivance with the cashier, for the plain purpose of sacrificing the interest of the stockholders, though less reprehensible in morals or less pernicious in its effects than the cases supposed, would still be an excess of power, from its illegality, and, as such, void as an authority to protect the cashier in his wrongful compliance. Now, the very form of these pleas sets up the wrong and connivance of the board as a justification; and such wrong and connivance cannot for a moment be admitted as an excuse for the misapplication of the funds of the bank by the cashier.

The instruction prayed for proceeds upon the same principles as the pleas. It supposes that the usage and practice of
[*72] *the cashier, under the sanction of the board, would justify a known misapplication of the funds of the bank. What is that usage and practice, as put in the case? It is a usage to allow customers to overdraw, and to have their checks and notes charged up, without present funds in the bank. Stripped of all technical disguise, the usage and practice thus attempted to be sanctioned is a usage and practice to misapply the funds of the bank, and to connive at the withdrawal of the same, without any security, in favor of certain privileged persons. Such a usage and practice is surely a manifest departure from the duty both of the directors and the cashier, as cannot receive any countenance in a court of justice. It could not be supported by any vote of the directors, however formal; and, therefore, whenever done by the cashier, is at his own peril, and upon the responsibility of himself and his sureties. It is any thing but "well and truly executing his duties as cashier." This view of the matter disposes of this embarrassing point, and also of the second

instruction prayed for by the defendants, which substantially turns upon the like considerations.

The third instruction prayed for, in effect, was that the court would instruct the jury that the defendants are not chargeable in this action for the conduct of Minor in the duties distinctly appertaining to the office of teller, whilst he was cashier in the bank, although those duties were duly assigned to him; because it constituted a distinct office, and the accounts and proceedings of the teller were at all times kept distinct, and in separate books from those of the cashier. In our judgment, this instruction was properly refused. By the fifth article of the second section of the by-laws of the bank, the duties of the cashier are generally pointed out; and among other things it is provided that he shall "do and perform all other duties that may from time be required of him by the president or board of directors relative to the affairs of the institution." On the appointment of Minor as cashier, who had previously acted as teller, the directors passed a vote "that the present officers of the bank do the whole duties of the bank." From the other circumstances of the case, the inference is irresistible that the duties of teller were, under this vote, assigned to the cashier. If so, then the performance of these duties constituted thenceforth a part of the duties of the cashier, as such; and as much so as if they had been originally affixed to the office of cashier. There is nothing in the nature of the duties of teller incompatible with those of cashier. On the contrary, as is well known, cashiers often perform the functions of both. The circumstance that the office of teller and distinct accounts and books were still kept up does * not vary the legal result. It [*73] was a matter of mere convenience and regularity for the government of the bank, in its own business, and probably had no higher or other origin than to preserve the same forms and series of accounts which the bank had adopted at its first institution. The office of teller had a nominal but not a real existence; and, from the time of the union of the duties in the cashier, as such, there was a legal extinguishment of the separate official character. If the cashier had originally had the duties of book-keeper and accountant assigned to him, and, in consequence thereof, had kept distinct account-books in the bank, no one would have imagined, because he kept separate account-books as cashier, for his own convenience, or according to the ordinary usage of banks, that he would not, under his bond, have been responsible for malconduct in keeping the general account-books of the bank to its loss or injury. The bond of the cashier must be construed to cover all defaults in duty which are annexed to the office from time to time, by those who are authorized

to control the affairs of the bank; and sureties are presumed to enter into the contract with reference to the rights and authorities of the president and directors under the charter and by-laws.

The remaining inquiry is as to the effect of the *nolle prosequi*, which the plaintiffs entered against Minor after he had pleaded, and after judgment was given against the sureties in favor of the plaintiffs, upon all the pleadings interposed by the sureties. The pleas of Minor were, *mutatis mutandis*, the same as the third, fourth, fifth, seventh, and ninth pleas, put in by the sureties; and the question arises whether, under such circumstances, (no objection to the judgment appearing to have been made by the sureties,) this proceeding is an error, for which that judgment ought to be reversed. It is material to state that the bond on which the suit is brought is a joint and several bond. Under such circumstances, the plaintiff might have commenced suit against each of the obligors severally, or a joint suit against them all. But in strictness of law, he has no right to commence a suit against any intermediate number. He must sue all or one. The objection, however, is not fatal to the merits, but is pleadable in abatement only; and if not so pleaded, it is waived by pleading to the merits. The reason is that the obligation is still the deed of all the obligors who are sued, though not solely their deed; and, therefore, there is no variance in point of law, between the deed declared on and that proved. It is still the joint deed of the parties sued, although others have joined in it. This doctrine is laid down, and very clearly illustrated, in Mr. Sergeant Williams's note [* 74] to the case of Cabell *v.* Vaughan, 1 Saund. *291, note 2, where all the leading authorities are collected. If, therefore, the present suit had been brought against the four sureties only, and they had omitted to take the exception by a plea in abatement, the judgment in this case would have been unimpeachable. Is the legal predicament of the plaintiffs changed by having sued all the parties, and subsequently entered a *nolle prosequi* against one of the obligors? If not in general, then is there any legal difference, where the party in whose favor the *nolle prosequi* is entered is not a surety, but a principal in the bond? not indeed, so named in the bond, but the suretyship resulting as a necessary inference from the nature and terms of the condition.

These questions must be decided by authority, if any such exist; if none can be found, then they must be decided by analogy and principle. It may be proper in this view again to notice the fact that this suit is on a joint and several bond; that the defendants severed in their pleas from the principal; that the trial of the issues, (which undoubtedly ought to have been, by the regular course of

practice, deferred until the cause was at issue as to all the parties, or the steps of the law taken to bring them into default,) does not appear upon the record to have been opposed, and that no motion was made in arrest of judgment, or for a postponement, until a trial of the issues upon the pleas of the principal might have been had. What would have been the proper proceedings under such circumstances, whether to try all the issues by the same jury, and have damages assessed at the same time against all the defendants; or whether there might have been several trials and several assessments of damages; and whether, if such several assessments had been made, and differed in amount, any, and what judgment, ought to have been entered, are points upon which the court does not think it necessary to give any opinion.

The nature and effect of a *nolle prosequi* was not well defined or understood in early times; and the older authorities involve contradictory conclusions. In some cases it was considered in the nature of a *retraxit*, operating as a full release and discharge of the action, and, of course, as a bar to any future suit. In other cases it was held not to amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person or cause of action to which it was applied. And this latter doctrine has been constantly adhered to in modern times, and constitutes the received law. In cases of *tort* against several defendants, though they all join in the same plea, and are found jointly guilty, yet the plaintiff may, after verdict, enter a *nolle prosequi* as to some of them, and take judgment against the rest. The reason is said to be, that the action is in its nature joint and several; and, as the [* 75] plaintiff might originally have commenced his suit against one only, and proceeded to judgment and execution against him alone, so he might, after verdict against several, elect to take his damages against either of them. *A fortiori*, the same doctrine applies where the defendants sever in their pleas. Indeed, in *tort*, as we shall hereafter see, it does not seem to have been denied that cases might exist, in which, if the defendants severed in their pleas, the plaintiff might, after judgment against one, have entered a *nolle prosequi* as to the others. The doubt was, whether he could do so before judgment, which was finally settled in favor of the right; and in such cases, where several damages were assessed against the different defendants, the difficulty was afterwards cured, by entering a *nolle prosequi* as to all but one defendant. And in the same manner, a misjoinder of improper parties is sometimes aided. The authorities on this subject will be found summed up with great accuracy in a note of Mr. Sergeant Williams, to the case of Salmons *v.* Smith,

1 Saund. 207, note 2. In the same note, the learned editor adds: "if an action is brought upon any contract against several defendants, who join in their pleas, and a verdict is found against them, it is apprehended the plaintiff cannot enter a *nolle prosequi* against any of them; because the contract being joint, the plaintiff is compellable to bring his action against all the parties thereto; and he shall not, by entering a *nolle prosequi*, prevent the defendants against whom the recovery has been had, from calling upon the other defendants for a ratable contribution."

So far as this reason goes, it is inapplicable to the present case; for the defendants are entitled not only to a ratable, but a full contribution over for the entire sum against the party in whose favor the *nolle prosequi* has been entered; and consequently the *nolle prosequi* does not touch their rights. It is observable, also, that the language is qualified by the words "who join in their pleas;" which are printed in italics, and may, therefore, fairly be presumed to have been inserted by the learned editor *ex industria*, with a view to point out an implied distinction between cases where there is a severance, and where there is a joinder in the pleas. If there be any such distinction it is favorable to the present case; for the plaintiffs severed in their pleas from their principal. The learned editor proceeds to state that, "if in such actions the defendants sever in their pleas, as where one pleads some plea which goes to his personal discharge, such as bankruptcy *ne unques executor*, and the like, not to the action of the writ, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others; for with respect to the bankruptcy, the statute [* 76] of 10 Ann, c. 5, makes the *other defendant, who is not a bankrupt, liable for the whole debt; and, therefore, in that particular instance, the case is exactly the same as where an action is joint and several. So the plea of *ne unques executor* does not deny the cause of action; but only that he is one of the representatives of the testator. When the defendants sever in their pleas, with this limitation as to the extent of the pleas in action upon contracts, it is immaterial what is the form of the action; for the plaintiff may enter a *nolle prosequi* against any of them before verdict, and proceed against the rest."

The learned editor is fully borne out in the general position here stated, by the case of Noke *et al. v.* Ingham, Wilson, 89, to which he refers. The only question is, whether there is any such qualification upon it as that the plea should be one going exclusively in personal discharge and not to the merits. That is the point of real difficulty. The case in 1 Wilson, 89, was upon several promises made by the defendants as partners. One of them pleaded a former judgment;

and issue being taken upon the replication of *nul tiel* record, judgment was given against him, and a writ of inquiry of damages awarded and final judgment. The other defendant pleaded his bankruptcy, and upon this issue was joined; and afterwards the plaintiff entered a *nolle prosequi* as to him. Upon error brought, the principal objection was that the *nolle prosequi*, upon a joint contract of two, was a discharge of both. Mr. Chief Justice Lee said: "It is agreed on all hands that, in trespass against several, the plaintiff may enter a *nolle prosequi* as to one, and that will not discharge the other; and, therefore, I cannot see why it may not be done in this case; and I do not see how so proper an advantage can be taken upon the statute of Ann as to the bankrupt, as is now taken by the entry of this *nolle prosequi*." Wright, J., was of the same opinion, and so was Dennison, J.; and the latter added that "the plea of the bankrupt is not a plea to the action, but only a personal discharge; but that if one defendant was to plead a plea that was to go to the action of the writ, he thought it might then have a different consideration, but that this is not the case here. This case is exactly the same as when an action is joint and several; for the statute 10 Ann, c. 15, has made the partner not a bankrupt liable for the whole debt. This case is the very same as to this matter of entering a *nolle prosequi*, as if it had been trespass against several defendants."

It is apparent, from this summary of the reasoning of the court, that the case turned upon the consideration that the contract, by the operation of the statute of Ann, was several as well as joint; and all the court concurred that, under such circumstances, the *nolle prosequi* would be good, being *governed in the anal- [*77] ogy to trespass, where the cause of action was several as well as joint. What was stated by Dennison, J., was not the exclusive ground of his particular opinion, but only a suggestion that the case might be, (not would be,) different upon a plea to the merits. Now the general reasoning comes very close to the case at bar; for here the bond is several as well as joint, and an action might have been maintained severally against the defendants; and what is not immaterial to be considered, all the parties were retained who had joined in their pleas, and between whom there existed a right of mutual contribution. Even in the case of bankruptcy the practice is, in England, to require all the joint contractors to be sued, as is proved by the case of Bovill *v.* Wood, 2 Maul. & Selw. 23, which makes it really less strong than a joint and several contract.

The case of Moravia and another *v.* Hunter and Glass, 2 Maul. & Selw. 444, which has been relied on at the bar, was *assumpsit* against four defendants, two of whom were not served; D., one of

the other defendants, pleaded, 1. *Non assumpsit.* 2. A special plea of bankruptcy. 3. A general plea of bankruptcy, as to whom the plaintiff entered a *nolle prosequi.* The other defendant pleaded *non assumpsit*, and a verdict was found against him. The form of the *nolle prosequi* was, that the plaintiffs, inasmuch as they "cannot deny the several matters above pleaded, by the said D., freely here in court confess that they will not further prosecute their suit against him." It was moved, in arrest of judgment, that the *nolle prosequi*, so entered, had confessed the *non assumpsit*, as well as the other pleas; and therefore the other defendant was also discharged, and the distinction of Dennison, J., in Noke *v.* Ingham, 1 Wils. R. 89, was relied on. But the court held that the *nolle prosequi* was, in effect, only a confession; that, as far as regards D., he had a defence in the matters pleaded by him. This case does not, in terms, overrule the distinction, but it does establish that the court upheld the *nolle prosequi*, notwithstanding the pleadings did set up a plea to the merits, and not merely a personal discharge. The contract does not appear to have been joint and several; and to have arrived at its conclusion, the court must have considered that the confession of the plaintiffs, that they could not deny the several matters above pleaded, ought not to be deemed an admission of the truth of the pleas, except so far as to waive further proceedings in the suit, against the party who sets them up as a defence. This conforms to the definition given in the book, of a *nolle prosequi.* "It is," as Sergeant Williams states, 1 Saund. R. 207, n. 2, "a partial forbearance by the plaintiff to proceed any further, as to some of the defendants, or to part of the suit, but still he is at liberty to go on as to the rest."

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These are the only cases in England, which the researches of counsel have brought to our notice, bearing directly on the point before the court; and upon looking into the elementary treatises and books of practice, we have not been able to find any more general doctrine. Indeed, the latter confine themselves exclusively to the enunciation of the principles above stated, with the qualifications annexed to them in these authorities, as, see 1 Chit. Pl. 32, 33, 546; Com. Dig. Pl. X 2, 3, 5; 1 Tidd's Prac. 630; 2 Arch. Prac. 219, 220; 2 Lilly Prac. Reg. 280. In America, the cases have gone a step further. In Hartness *v.* Thompson, 5 John. R. 160, where an action was brought against three, upon a joint and several promissory note, and there was a joint plea of *non assumpsit*, and the infancy of the defendants, that was set up at the trial; it was held no ground for a nonsuit; but the plaintiff upon a verdict found in his favor against the other two defendants, might enter a *nolle prosequi*, as to the infant, and take judgment

upon the verdict against the others. In Woodward *v.* Newhall, 1 Pick. 500, in the supreme court of Massachusetts, upon a joint contract and suit against two persons, one of whom pleaded infancy, it was held that a *nolle prosequi* might be entered, as to the infant, and the suit prosecuted against the other defendant. These decisions were admitted to be against the cases of Chandler *v.* Parkes, 3 Esp. R. 76, and Jaffray *v.* Frebain, 5 Esp. R. 47, but the court thought the practice adopted by themselves was most convenient, and therefore gave it a judicial sanction. These cases were distinguishable from that in 1 Wils. R. 89, in the fact that the plea went not only in personal discharge, but proceeded upon a matter which established an original defect in the joint contract; whereas the plea of bankruptcy was for matter arising afterwards. The distinction was not thought to be sound. Indeed, the court seem to have considered the question rather as a matter of practice, to be decided upon convenience and policy, than as matter of principle.

Hitherto, the question has been discussed as if the *nolle prosequi* had been entered before, when in fact it was entered after judgment against the defendants. The next inquiry is, whether this creates any substantial difference in the case. In Lover *v.* Salkeld, 2 Salk. 455, in trespass against two defendants, and verdict for the plaintiff, one being an infant, the plaintiff took judgment against the other, and entered a *non pros.* after the judgment against the infants, and took out execution upon the judgment; upon error brought, it was objected that *a *non pros.* could not be entered after [*79] judgment, for the judgment could not vary from the demand of the writ. It was argued on the other side that torts were several, and that a *non pros.* might be entered after as well as before judgment, and cases to this effect were cited. Lord Holt is reported to have said that he supposed there were interlocutory judgments, wherein it might well be; but a final judgment differed, for that being once wrong a subsequent entry would not set it right. The case was however adjourned, and nothing more appears of it. This case is not very accurately reported, and it may have been that the judgment was joint, and the *nolle prosequi* afterwards, which would remove the objection to its authority. The circumstance of its being adjourned, shows that the doctrine thrown out by Lord Holt was not deliberately considered by him, and was deemed not clear. In truth, it is directly against the case of Parker *v.* Lawrence, decided in the exchequer chamber, and reported in Hobart's R. 70. That was trespass against three; one pleaded not guilty, and the other two a justification, to which the plaintiff replied, and there was a demurrer to the replication. Pending the demurrer the issue was tried, and

damages and judgment given against him. After judgment, the plaintiff entered a *nolle prosequi* against the other two, and a writ of error was afterwards brought by all three; and it was alleged for error, that the *nolle prosequi* discharged all three. It was agreed by the court, (in conformity with the doctrine then prevailing,) that if the *nolle prosequi* had been before judgment, it would have discharged the whole action; and so it would, if the judgment had been against them all, and then the plaintiff had entered a *nolle prosequi* against the other two; for a nonsuit or release or other discharge of one discharges the rest. But here the action was at an end, as to the one, by the judgment against him, and no judgment was had against the others; so that they were divided from him, and are not subject to the damages found against him. It was adjudged that he was not discharged, and there was no error. This case is of great authority, having been deliberately decided by a very high court. It is cited as authority, by Chief Baron Comyns, in his Digest, Plead. X. 5, who also cites Plead. X. 3, the case in Salkeld, as one in which there was a final judgment against all the defendants. The reason of the thing would seem entirely in favor of the judgment in Hobart, and it stands supported by a much earlier case, in the year books, 14 Edw. IV.; Brooks, abridg. Tresp. pl. 331. If the plaintiff may, in any case, recover a judgment against one on a joint action against two, who sever in their pleadings, it is wholly immaterial to the regularity and effect of that judgment, in what stage of the cause the [*80] suit has ceased to be *prosecuted against the other. It is sufficient that in the event the judgment is consistent with the general principles of the action. If a *nolle prosequi* may be entered after verdict, and before judgment, without discharging the other party, there is no good reason why it may not be done after judgment, when there has been no proceeding which binds the plaintiff to consummate a judgment against the party whom he wishes to dismiss. In each case the judgment upon the whole record is consistent with the writ.

The result of this examination into authorities is, that there is no decision exactly in point to the present case; that there is no distinction between entry of a *nolle prosequi* before and the entry after judgment, applicable to the present facts. That the authorities, and particularly the American, proceed upon the ground that the question is matter of practice, to be decided upon considerations of policy and convenience, rather than matter of absolute principle; and that therefore this court is left at full liberty to entertain such a decision as its own notions of general convenience and legal analogies would lead it to adopt. We are of opinion that where the defendants sever in

their pleadings, a *nolle prosequi* ought to be allowed. It is a practice which violates no rules of pleading, and will generally subserve the public convenience. In the administration of justice, matter of form not absolutely subjected to authority may well yield to the substantial purposes of justice.

JOHNSON, J., dissenting.

The facts appearing upon the records, from the count, pleas, and replications, are these: This action was on a bond given for the faithful discharge of the office of the cashier, by Philip H. Minor. It was joint and several. The defendants craved over jointly, and pleaded performance, to which the plaintiff replied.

They afterwards had leave to withdraw the joint pleas; and the four securities jointly filed various pleas, to which plaintiff replied; and issue being taken, proceeded to trial, and obtained this verdict.

After the verdict, the principal to the bond was ruled to plead, and he then files a variety of pleas, similar in effect to those pleaded by the securities. The court then gave judgment upon the verdict, and the plaintiff's attorney enters this *nolle prosequi;* and judgment is given for the principal, on the bond. That the plaintiffs take nothing by their bill, but, for their false clamor, be in mercy, and that the defendant go thereof, without day, and receive his costs.

It was insisted by the defendants that, in this state of the pleadings and record, the plaintiffs ought not to have had judgment * below; that there is error, and the judgment should [*81] be reversed. What further order this court would be bound to render upon a reversal, it is not material to inquire. I readily assent to the doctrine that, in adjudicating upon questions of practice, a court should have regard to public convenience; but it would be extending this principle to the violation of its own spirit and intent, if carried to the extent of overturning known established rules, both of law and practice.

To this extent, it appears to me, the present decision goes; and that this judgment cannot be affirmed without shaking as well established principles as adjudged cases, and opening a door to inconveniences which must soon compel this court to retrace its steps.

The judgment, as it stands below, is against four out of five joint and several co-obligors; and the obligor omitted, or rather who has judgment in his favor, is the cashier, for whose good conduct in office the other three became bound. Now, this judgment is either a bar to a future suit against the principal, or it is not. If a bar, then the record exhibits the inconsistent case of four being made liable for one, who was not liable himself. And if it is not a bar,

then, by possibility, it may be established by the verdict of a future jury, that the co-obligor, for whose misfeasance alone these defendants have had judgment against them, had, in fact, committed no misfeasance. A rule of practice that may lead to such consequences, cannot rest upon public convenience.

Nor is it more easy to reconcile it to principle. No authority need be cited to establish that, wherever judgment ought to have been arrested below, this court is bound to reverse for error. Now, this judgment is against one of the canons of the law of contracts. It was at the option of the plaintiff whether to treat the bond as a joint or several contract. He has elected to treat it as joint; and must, therefore, abide by the law of joint contracts, as to both right and remedy; and, upon these, when under seal, it is an invariable rule that all must be sued, if all have sealed the instrument and are in life.

It is true that, in general, the non-joinder of co-obligors must be pleaded in abatement; but it would be oppressive and inconsistent to apply this rule to a case in which it was impossible to plead in abatement, and that was precisely this case; since the discharge of the principal from the action was produced by the act of the plaintiff, after judgment, at a time when it was impossible, by any form of pleadings, for the defendants to avail themselves of this right. But this case comes within an exception to the general rule on the subject of pleas in abatement; since, by the plaintiff's own showing, in his declaration and replication, all the co-obligors named in the instrument sealed it, and were in life at the commencement and close of the suit.

[*82]

This distinction, if it be necessary to cite authority for it, clearly appears from comparing the case of Rice *v.* Shute, 5 Bur. 2611, with the case of Hermer and Moore, noticed in the report of that case. In the one it was necessary to plead in abatement, because the facts did not appear on record, which were necessary to maintain the defence. In the other the judgment was arrested, because the facts of the plaintiff's own showing made out that he ought not to have judgment; which were, all had sealed the instrument, and all were alive. It cannot be questioned that, in a joint contract by five, where all remain equally bound, all in life, and all within reach of the process, more especially where they have been all actually arrested, the plaintiff must recover against all or none. This is that case; and yet the plaintiff is allowed here to take judgment against four, and discharge the fifth, the principal, by *nolle prosequi*, after judgment.

It cannot be doubted that, had this *nolle prosequi* been entered be-

fore trial, the defendants must have been permitted to plead it, *puis darrien continuance*, and that the plea must have been sustained. And, what reason is there for placing them in a worse situation, by suffering the *nolle prosequi* to be entered after judgment? It is said they severed in pleading, and suffered the cause to go to trial without objection. But, was it in the power of these defendants to compel their co-obligors to join them in pleading? or, if the plaintiff choose to proceed erroneously to trial, were the defendants under any obligation to arrest him and set him right? It was his own folly if he ruled them to trial, or consented to go to trial, or committed any other error in proceeding to judgment. I have stated it to be not indispensable, in my view of the subject, that the *nolle prosequi* should be a bar in this case to a new suit against the principal. The derangement of the rights and liabilities of the parties, produced by it, appears a sufficient objection both to the principle and practice. For, certainly, it goes to enable a plaintiff to recover, by this device, against parties, who otherwise could have defeated his action by suitably pleading. By a novel practice, as it relates to joint contracts, he is here permitted to evade an important legal principle. But, if this *nolle prosequi* can be shown to be a bar to his action against the principal co-obligor, it would seem to be incontestable that this judgment ought to be reversed. And I am yet to learn that, in a joint action in contract against several, a *nolle prosequi*, as to the whole action against one, is not a bar as to him.

[*83] * The cases are very few in the books, in which the effects of a *nolle prosequi*, in such a case, has been tried by the only sufficient test — a plea in bar, to a suit upon the same contract. But, as far as they have gone, they maintain the bar.

If a bar, in cases in which the suit is against a single defendant, there can be no reason assigned why it should not be a bar as against one of the several defendants. And to this point, Beecher's case, reported in 8 Coke, 58. Croke, James, 211, is direct and positive.

That was a suit upon a bond, and the judgment there is nearly in the words of the judgment in this case. On a second action upon the same contract, this was held to be a bar; and it became necessary to remove the judgments, by a writ of error, for some technical informalities, before this obligee could recover in the original contract.

It is true that Sergeant Williams has said, in his note to 1 Saund. 207 a, "that a *nolle prosequi* is now held to be no bar to a future action for the same cause, except in those cases where, from the nature of the action, judgment and execution against one is a satisfaction of all the damages sustained by the plaintiff."

And, by reference to the next page of his note, it appears that the exception here introduced is intended to embrace actions for torts; and, therefore, his rule is intended to apply to actions on contracts.

But, the authorities he cites are far from bearing him out in his doctrine. The case of Cooper *v.* Tiffin, 3 T. R. 511, upon which he relies, decides nothing but a question of costs; and the position that a *nolle prosequi* is no more than a discontinuance, and the party may sue again, is only an *obiter dictum*, in case where the point was not presented.

So, also, of his other cases, in 1 Will. 89. The facts did not raise the question on the effect of the *nolle prosequi*, as to the defendant who was discharged by it; and the judges, in considering whether the plaintiff could have judgment against some of the joint contractors, where the other was discharged by bankruptcy, expressly decide upon the ground that he, being discharged by law, leaving the other bound for the debt, produced an analogy between that case and the case of a suit in trespass, where one only might be sued separately. But it is said, and so Sergeant Williams asserts, "that the true nature and extent of a *nolle prosequi*, in civil cases, was not accurately defined and ascertained until modern times."

My own opinion is, from all the investigation I have been able to make, that it was much better understood in former times than it is at this day. That, if it were now better understood, we [*84] should perceive fewer of those inconsistencies which *are supposed to exist in the decisions on this subject. Thus, Sergeant Williams has mixed up the cases on torts, with those on contracts, in such a manner as could only produce confusion. To sustain the doctrine that a *nolle prosequi*, in an action of debt, is a bar to another suit on the same bond, he quotes Green *v.* Charnock, Croke, Eliz. 762, which was trespass *quare clausum fregit*. And for other cases which, he says, establishes the principle, "that a *nolle prosequi* is not of the nature of a *retraxit* or a release; but an agreement only, not to procced as to some of the defendants, on a part of the suit." Without restricting the doctrine to any class of cases, he cites a string of authorities, in every one of which the decisions were in actions of trespass or tort.

Yet, it cannot be contended that the use of the *nolle prosequi* in cases of tort, in which the defendants may be joined and disjoined at the pleasure of the plaintiff, can afford precedent or authority for the use of it in cases of joint contract; in which the law, regarding the nature of the contract and the rights of the parties, imposes on the plaintiff the obligation to sue them jointly.

To me, it appears that there is abundant authority to prove that

the *nolle prosequi*, though entered by attorney, with the judgment that defendant *eat sine die*, has the effect of a *retraxit*. Lord Coke certainly places them on the same foot, both in his Institutes, 1 Inst. 139, and his comment upon Beecher's case, 8 Rep.; and in both instances he describes the *nolle prosequi* as one of two kinds of *retraxit*, appropriate to different cases, but both producing a bar. And yet, in one only is the term *retraxit* introduced into the entry of judgment. See, also, 2 Rolls Abridg. *nolle prosequi*.

In Green *v.* Charnock, Cro. Eliz. 762, they are certainly treated as synonymous and equivalent. That was trespass, *quare clausum fregit*, against C. and S. S. made default, and judgment of *nil dicit* was then taken against him. C. pleaded in bar, plaintiff replied, &c., and judgment in demurrers for plaintiff. A *nolle prosequi* was then entered against S., and writ of inquiry and judgment against C. And the case proceeds: "Thereupon they brought error, and the error assigned was, because this *nolle prosequi* is against one, when judgment is taken against both; being that a *retraxit* against one is as strong as a release against the one, the which being to one defendant, is a good discharge to both." So, again, in the case of Dennis *v.* Payn, Cro. Car. 551, P. and P. gave their joint and several bond to D., who sued the one severally, and, after plea, entered a *retraxit*. He afterwards brought suit upon the bond against the other, P., who plead the *retraxit* to the first in bar. There was no question made upon its being a bar, either direct * or by estop- [*85] pel; as to the obligor first sued, it is, in terms, admitted.

But the benefit of that discharge was claimed by the second P., and on this the judges divided, one maintaining that its effect was that of a release, and the other, that of an estoppel, only to be taken advantage of by him, in whose favor it was entered; and Croke, who held it to be an estoppel, identifies it with a *nolle prosequi*, by observing that it is "*quasi* an agreement that he will no further prosecute; *non vult ulterius prosequi*." So that both admit it to be a bar against the one discharged. So in Hobart, 70, and in 3 Kebble, 332, p. 31, in the year 1674; *nolle prosequi* and *retraxit* are considered as synonymous. So in Silley's Practical Register, in 1719, a *nolle prosequi* is defined thus: "This is, that the plaintiff will proceed no further in his action, and may be as well before as after verdict; and is stronger against the plaintiff than a nonsuit, for a nonsuit is a default for non-appearance, but this is a voluntary acknowledgment that he hath no cause of action." (Title, *Nolle Pros.*)

So Sergeant Salkeld, who comes down in the time of Queen Ann, refers to Beecher's case for the law of *retraxit*, and gives the definition of *retraxit* in the words of the entry of a *nolle prosequi*, (Title,

Raym. 3 Salk.) So in 4 Wood, 87, in the year 1691, it is distinctly asserted that an entry "of a *venit hic in curia, et fatitur hic in curia*, with a judgment that defendant *eat unde sine die*," is equivalent to a *retraxit*. At what period a different idea begun to prevail, I have not been able to discover; certainly I can find no adjudged case to support it.

In the case of Walsh *v.* Bishop, in Cro. Car. 239, 243, referred to by Sergeant Williams, as introducing a different doctrine, is directly against him. That was an action of trespass and battery against two; they severed in pleading, and after verdict against both, a *nolle prosequi* was entered against one, and the other moved it in arrest of judgment. In that case, it is admitted, in terms, by the court, that as to the one, the *nolle prosequi* was an absolute bar. And by reference to the same case, in page 239, it will be seen that the argument rested upon the right of a plaintiff to proceed against one of the several defendants in trespass.

If this plaintiff ever had a right to proceed against these four defendants in originating this suit, I should have felt no doubt. That is the case in trespass, that is the case where one defendant is bankrupt, or an infant, or pleads *ne unques executor*, 1 Will. 89; 3 Espin, 76. There is a modern book of practice of great respectability, (I mean Sellon, title, *Nolle Prosequi*,) in which this doctrine is summed up to my entire satisfaction. The form of the entry is there given in words, and conforms entirely to the entry in this case, except that the words are here added, that "the plaintiffs take nothing [*86] by their *bill, but for their 'false clamors be in mercy;'" which can, at least, detract nothing from the effects of the judgment. Yet it is there laid down, as the law of his day, that such a judgment, when it goes to the whole cause of action, operates in effect as a *retraxit*. The judgment in this case goes to the whole cause of action, and, as between the plaintiff and the cashier, is of the same effect as if there had been no other defendant to the action. In a subsequent part of the article, the same author (Sellon) recognizes the distinction between cases of trespass or tort and cases of contract, and lays down the rights of the parties in each, in accordance with the views I entertain on the subject, to wit: that if the *nolle prosequi* be entered, so as to produce any derangement in the rights of the defendant to deprive them of a legal defence, or subject them to increased difficulties or liabilities, it is error.

The case in Maule & Selwyn, which was supposed to have overruled the previous decisions, is in perfect accordance with them; for, although the defendant had pleaded *non assumpsit*, he had also pleaded his discharge as a bankrupt. On the contrary, if the lan-

guage of the court in that case be considered as affording the true *rationale* of the entry of the *nolle prosequi*, it would be fatal to the plaintiffs in this cause. The court say it amounts to an acknowledgment that the one defendant had a defence. But what defence did this co-obligor set up, that the other defendants ought to have the benefit of? His pleas were, in terms, those which had been pleaded by these co-obligors. If this confession of plaintiffs went to those pleas, then were these defendants discharged, since they could not be liable if he was not guilty.

It is a question of no importance — one of no influence upon the law of the case, whether a *nolle prosequi* may be entered before or after judgment, or when it may be entered, otherwise than as it affects the legal relations of the parties and the rules which govern suits at law.

And here, I think, I may very confidently maintain that in no case can a *nolle prosequi* be legally entered, as to one of the defendants, unless the suit might originally have been maintained against those who remain; or, unless the remaining defendants might have availed themselves of pleading the non-joinder of their co-obligor, if their rights were affected by his exclusion from the action.

In the first class are comprised all actions of tort, in which no prejudice is done to the defendants, since their co-defendant need not originally have been made a party. And I may add, also, the case of bankrupts and infants, both of whom, when joint-contractors, may be admitted as defendants upon declaring against their co-obligors, according to the truth of the *case. They may, [*87] also, without prejudice to their co-defendants, be discharged by *nolle prosequi;* but even as to them, it seems the precedents imposed a restriction; for it is not permitted, if they have blended their fate with that of their co-defendants by joining in their pleas. They have, then, waived their privilege. If their pleas impart no waiver of their privilege, the right of the plaintiff to his *nolle prosequi*, as to them, is conceded; because the relations of the parties are not altered, nor their rights in any way prejudiced. But I conceive the *nolle prosequi* cannot be entered at any point of time when it would place the defendants in a worse situation or deprive them of any advantage of making their defence.

Surely, the precedents for entering the *nolle prosequi* after judgment in actions of trespass against some defendants, and going on to levy satisfaction from the rest, can afford no precedent here, since it is, in the one case, what the law enjoins; in the other, what it forbids.

Nor are the precedents of cases, in which the one defendant never

was bound or is discharged by operation of law, without discharging the other, any better authority. In all these cases, the relative rights and liabilities of the parties remain the same. No legal absurdities can ensue, and no more is given against them by the judgment than what could have been legally claimed of them by the action.

There is one curious result produced by this decision, which is not among the least of the objections to rendering a judgment for the defendant in error. It cannot be contested, and the whole argument is admitted, that if the discharge of the principal produce a bar in his favor, this judgment should be reversed for error. But the conclusion, that it is no bar, is now to be deduced from a string of decisions, in every one of which Sergeant Williams himself admits that no recovery could be had against the defendant, who has been discharged by the *nolle prosequi*. It is true, he attributes this bar to the nature of the action; but this is, at least, acknowledging that the material question, in the trespass cases, never could arise in the present case. In the only case, however, even in trespass, in which the question in this case came distinctly before the court, I mean the case of Green *v.* Charnock, Croke, Eliz. 762, in which there was an interlocutory judgment against S., and judgment pronounced against C., and a *nolle prosequi* as to S., it was adjudged that the *nolle prosequi* as to S. was a release to him, and therefore to C.; and the judgment against C. was reversed in error brought, and yet there they did not join in the pleading. If, in the present case, the defendants had all pleaded, whether jointly or severally, and verdict had been for the one defendant, on any plea to the merits, it is [*88] clear that, *notwithstanding a verdict had passed for the plaintiff against the remaining four, he could not have had judgment. 1 Saund. 217. And the distinction between the actions of debt and trespass, on this point has been, until now, considered as known and established. 1 Plow. 66, 6; 8 Rep. 120, 133; 2 Lilly Ab. 210, 107. Upon the whole, I am very clear that this judgment ought to be reversed, and judgment below entered for defendants.

Judgment affirmed, with costs.

5 P. 641; 11 P. 86; 16 P. 303; 5 H. 53; 9 H. 248; 17 H. 609; 19 H. 318.

JOSEPH PEARSON AND ROBERT Y. BRENT, Executors of Robert Brent, deceased, Plaintiffs in Error, *v.* THE BANK OF THE METROPOLIS, Defendants in Error.

1 P. 89.

Parol evidence is admissible to prove that all the parties to a negotiable note agreed that payment should be demanded of the maker at a particular bank, the note being silent as to the place of payment or demand.

ERROR to the circuit court for the District of Columbia, in an action by the bank as indorsee of a note made by George A. Carroll, payable to and indorsed by W. Carroll and Robert Brent, for $1,100, in sixty days, and negotiable at the Bank of the Metropolis. The declaration averred a demand on the maker at the bank.

The substance of the exceptions taken by the defendants below, appears in the opinion of the court.

Swann and *Worthington*, for the plaintiffs.

Key, contrà.

* MARSHALL, C. J., delivered the opinion of the court:— [* 91]

This was a suit brought in the circuit court of the United States, for the District of Columbia, on a note made by G. A. Carroll, and indorsed by William Carroll and Robert Brent, the testator of the plaintiffs in error, and made negotiable in the Bank of the Metropolis.

The declaration set out the note, and averred a demand of the same, "at the Bank of the Metropolis," where the said note was negotiable.

At the trial, the plaintiffs below proved that the accommodation given by the bank to said G. A. Carroll, on a note similarly drawn and indorsed with the present, was given by the bank about three years before the date of the note on which this suit was brought; and was given with the knowledge of the indorsers thereon, and in consequence of their solicitation.

For the purpose of showing an agreement between the bank and the maker of the note, that the note to be discounted, and those thereafter to be made for its renewal, should be payable at the Bank of the Metropolis, and there demanded; the bank proved by parol testimony, that the said G. A. Carroll did not reside in the district after the winter of 1817, in which W. Carroll lived in Washington, but resided at Port Tobacco, in Maryland, about twenty miles from the city, which he occasionally visited; that many of the notes, taken for the continuance of the accommodation, were expressed to be payable at the said bank; and that all the notes previous to that on which this suit was brought, were there demanded, which demand was acquiesced in as sufficient, and subsequent notes given in renewal of those so demanded. The bank also proved that it was its custom, in all cases where the maker was a non-resident, to require an agreement to pay such notes at the bank, and that they never would have agreed to discount the said notes, but on this condition.

The counsel for the defendants below objected to this testimony, but the court permitted it to go to the jury. The counsel for the defendants below then prayed the court to instruct the jury, that to enable the plaintiffs to sustain their action, it was necessary to prove that a personal demand had been made on the maker of the note.

[* 92] The court refused to give this instruction; but did instruct the jury that if they * should be satisfied from the evidence, that it was agreed by all the parties, whose names appear on the notes, that the payment should be demanded at the Bank of the Metropolis, and that it was so demanded, then a personal demand on the maker was not necessary. An exception was taken to these opinions of the court, and their correctness is now to be examined.

The plaintiffs in error contend that the testimony ought not to have been admitted, because it is an attempt, by parol proof, to vary a written instrument. But this is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person, when the parties are silent, is an inference of law, which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses with a personal demand. The parties consent to a demand, at a stipulated place, instead of a demand on the person of the maker; and this does not alter the instrument, so far as it goes, but supplies extrinsic circumstances, which the parties are at liberty to supply.

No demand is necessary to sustain a suit against the maker. His undertaking is unconditional, but the indorser undertakes conditionally to pay, if the maker does not; and this imposes on the holder the necessity of taking the proper steps to obtain payment from the maker. This contract is not written, but is implied. It is, that due diligence to obtain payment from the maker shall be used. When the parties agree what this due diligence shall be, they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes only where they are silent. We think, then, that there was no error in admitting the parol evidence which was offered to sustain the action.

If the testimony was admissible, there is no error in the instruction given by the court. It was, that if the jury believed, from the evidence, that it was agreed by all the parties that the demand should be made at the Bank of the Metropolis, and that it was so made, then a demand of the maker was not necessary.

This point is, we think, involved in the question respecting the admissibility of parol testimony, to establish the agreement. Had the note purported on its face to be payable at the Bank of the Me-

tropolis, that express agreement would undoubtedly have dispensed with a personal demand. If that agreement can be made by parol, (and unless it can, the testimony was inadmissible,) the effect of the parol contract is the same on this point as if it had been in writing. The only * inquiry therefore is, whether the testi- [* 93] mony was sufficient to be submitted to the jury for the purpose of proving the agreement. We think it was.

The circumstances that the indorsers were themselves active in procuring the accommodation for the maker of the note; that the accommodation had been continued for years without a demand on the person of the maker; that it was the invariable usage of the bank, when the maker of an accommodation note resided out of the city, to require, as the condition of the loan, a stipulation that a demand at the bank should be sufficient; that this accommodation would not have been continued after the removal of the maker out of the city, but on this condition; that the note purports, on its face, to be negotiable at the Bank of the Metropolis; are facts from which the jury might justifiably infer the agreement of the parties to dispense with a demand on the person of the maker.

A verdict having been rendered for the bank, the defendants in the court below filed errors in arrest of judgment.

The error alleged is, that the first count in the declaration neither charges a personal demand on the maker of the note, nor excuses the omission to make such demand. The declaration certainly does not charge a demand on the person of the maker; but this was not necessary, if the parties had agreed that a demand at the bank should be substituted for a demand on the maker.

The plaintiffs in error contend, that the agreement is not alleged in the declaration, and we admit that the omission to make this averment would be fatal. In that event, the plaintiff below would have shown no cause of action. But the declaration avers a demand of the note, "at the Bank of the Metropolis," where the said note was payable. The note is set out in the declaration, and does not purport, on its face, to be made payable at the bank. But the averment in the declaration, that it was payable there, cannot be true, unless there was an agreement of the parties to that effect. It is an averment which must have been proved at the trial, or the plaintiff below could not have obtained a verdict and judgment.

After a verdict, it is, we think, sufficient to sustain the judgment.

There is no error, and the judgment is affirmed, with costs.

PHILIP HICKIE and others, Heirs and Legal Representatives of JAMES MATHER, deceased, Appellants, *v.* ALEXANDER B. STARKE and others, Heirs and Legal Representatives of ROBERT STARKE, deceased, Appellees.

1 P. 94.

Under the 25th section of the Judiciary Act, though a treaty or act of congress need not be specially pleaded, the record must show a complete title under the treaty or act relied on, and that the court below decided against its validity.

THE case is stated in the opinion of the court.

Livingston, for the plaintiffs.

M'Duffie and *Coxe*, contrà.

[* 97] * MARSHALL, C. J., delivered the opinion of the court. This is a writ of error, to a decree pronounced in the court of the last resort, in the State of Mississippi, directing the plaintiffs in error to convey to the defendants a certain tract of land, in the said proceedings mentioned. The plaintiffs in error allege that their title was secured by the compact entered into between the [* 98] United States and Georgia, for the * cession of the country in which the land lies; and that this decree is in violation of that compact. The defendants insist that the compact between the United States and Georgia was not called into question; and that the 25th section of the Judicial Act,[1] does not give this court jurisdiction of the case.

In the construction of that section the court has never required that the treaty or act of congress under which the party claims, who brings the final judgment of a state court into review before this court, should have been pleaded specially, or spread on the record. But it has always been deemed essential to the exercise of jurisdiction in such a case, that the record should show a complete title under the treaty or act of congress, and that the judgment of the court is in violation of that treaty or act. The condition in the Cession Act, on which the plaintiffs in error rely, is in these words: "That all persons who, on the 27th day of October, 1795, were actual settlers within the territory thus ceded, shall be confirmed in all the grants legally and fully executed prior to that day, by the former British government of West Florida, or by the government of Spain."

The plaintiffs produce a grant, legally and fully executed; but, to bring the case under the treaty, they must also prove that the ancestor or person under whom they claim was an actual settler on

[1] 1 Stats. at Large, 85.

the 27th October, 1795. The answer asserts that the warrant of survey issued on the 7th day of February, 1793, and the survey made on the 20th July, in the same year, when possession was taken; and that the patent issued on the 3d April, 1794. James Williams deposes that about the 3d December, 1795, he took possession of the tract of land in dispute, as overseer for James Mather the patentee, and understood from him, that he had gone to Natchez some time before, to apply for land in the part of the country where the tract in controversy lies. This is the testimony furnished by the record, to prove that James Mather, the grantee, was an actual settler, according to the requisition of the Cession Act of Georgia. In Henderson *v.* Poindexter, 12 W. 530, the term "actual settler," seems to have been understood as synonymous with the resident of the country. That case, however, did not require that the precise meaning of the term should be fixed, and the court is disposed to think that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient; though the proprietor should not reside in person on the estate, or within the territory. Had the settlement proved by Williams, been made at the day required by the Cession Act, it would, we think, have satisfied the requisition of that Act, and entitled the plaintiffs in error to the benefit of the condition. But it was not made until the 3d of *December, [*99] 1795. We think, then, that the plaintiffs in error have failed to prove that the person under whom they claim was an actual settler on the 27th day of October, 1795; and that the court has no jurisdiction of the cause.

The writ of error dismissed, it not appearing that this court has jurisdiction of the cause.

10 P. 368; 16 H. 494.

THE UNITED STATES, Appellants, *v.* THE SALINE BANK OF VIRGINIA, John Webster, and others, Appellees.

1 P. 100.

A bill in equity for discovery and to charge the defendants with the payment of certain bills issued by a voluntary banking association of which they were members, such associations being prohibited under penalties by the law of the State where the business was carried on, cannot be maintained.

APPEAL from a decree of the district court of the United States for the western district of Virginia, dismissing a bill in equity filed by the United States against Webster, as cashier, and others as members of an unincorporated banking association, called the Saline Bank of Virginia. The bill stated that the association issued bills

as currency; that some of these bills came into the treasury of the United States in payment of public dues; that payment had been demanded and refused, and it prays an account of the funds of the company and their application to the redemption of these bills, and also that the property of the individual members of the company may be decreed to be liable, and may be applied to make good any deficiency.

The defendants pleaded, in substance, that the emission of these bills took place within the State of Virginia, by the law whereof penalties were inflicted for such emission, &c., and prayed judgment whether they should be held to answer.

The case was submitted, without argument, by the *Attorney-General*, *Webster*, and *Dodridge*.

[*104] *MARSHALL, C. J., delivered the opinion of the court.

This is a bill in equity for a discovery and relief. The defendants set up a plea in bar, alleging that the discovery would subject them to penalties under the statute of Virginia.

The court below decided in favor of the validity of the plea, and dismissed the bill.

It is apparent that, in every step of the suit, the facts required to be discovered, in support of this suit, would expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it.

The decree of the court below is, therefore, affirmed.

DANIEL RHEA and others, Appellants, *v.* DANIEL RHENNER, Appellee.

1 P. 105.

Though a *feme covert*, abandoned by her husband, may contract debts as a *feme sole*, she cannot, under the law of Maryland, convey her lands by her separate deed.

THE case is stated in the opinion of the court.

Coxe, for the appellants.

Key, contrà.

[*106] *DUVALL, J., delivered the opinion of the court.

This case is brought up, by appeal, from the circuit court for the District of Columbia, and county of Washington, sitting in equity.

The appellee, who was complainant, in the court below, filed his

bill in equity, in the year 1822, in the circuit court against Daniel Rhea, and Elizabeth his wife, and William Erskine an infant son of said Elizabeth. The bill alleges that Elizabeth Rhea, formerly Erskine, was indebted to the complainant in the sum of $300 for goods sold and delivered; that being pressed for payment, she, with the defendant Rhea, with whom she then lived, agreed that if allowed further time they would secure the debt, by conveying to Rhenner a lot of ground, No. 165, in Beatty and Hawkins's addition to Georgetown; which was the property of said Elizabeth, and which had been conveyed to her by the name of Elizabeth Erskine.

That Rhea, together with the said Elizabeth, by their deed *bearing date May 13, 1819, conveyed to the complainant [*107] the lot of ground before mentioned, for the purpose of securing the debt, with interest; and stipulated that if the debt was not paid in two years it should be held in trust, with dower to sell the same, and apply the proceeds, &c.

The bill further states that the said Daniel and Elizabeth, a few days before the date of the deed to the complainant, namely, on the tenth of May, 1819, but after the agreement to convey to the complainant, fraudulently conveyed the same premises to the defendant, Erskine, an infant son of said Elizabeth, in fee, in consideration of natural love and affection; that he, the said Rhenner, had at a considerable expense, at the request and with the knowledge and approbation of the defendants, erected improvements on the lot, and put a tenant in possession of the same; but that the defendant, by collusion, soon after obtained possession of the same, and still keeps it, claiming to hold it under the deed to the infant. The bill concludes with praying that the deed to William Erskine may be declared void, and that the property may be sold to pay his claim, &c.

The defendant Daniel Rhea, in his answer, admits that his wife, before his intermarriage with her, namely, in May, 1819, was the wife of one Robert Erskine, and was engaged in carrying on business for herself; that he did agree to join, and did join her, in the conveyance to the complainant, and in that to her son; that he had no title or interest in the premises; that the property belonged, in May, 1819, to Elizabeth Erskine, who was a married woman, and he denies all the other allegations in the bill.

Elizabeth Rhea, in her answer, avers that she was married to Robert Erskine in January, 1812; that after her marriage, in the absence of her husband, one Adam Mayne conveyed to her the premises mentioned in the bill of complaint, the deed bears date on the 7th of April, 1817; that her husband Erskine, left her in the year 1814, and she believed he was alive in May, 1819, and that she was

not at that time the wife of Daniel Rhea; that in July, 1821, Erskine having then been beyond seas more than seven years, she married Daniel Rhea, having received no support from her former husband, since he left her.

The answer of the infant is put in by his guardian, in the usual form, submitting to the protection of the court, without admitting or denying any of the facts alleged in the bill.

In this state of the proceedings, the court decreed a sale of the lot before mentioned, for payment of the claim of the complainant; and appointed a trustee to make the sale, under the terms prescribed in the decree, reserving the claim of the complainant for proof [*108] on it, and further order. From this decree, *there was an appeal, and the cause is now before this court for their decision. The question submitted by the arguments of the counsel is, whether the contracts and engagements of Elizabeth Rhea, made in the absence of her first husband, and prior to her marriage with the defendant, Rhea, are obligatory, and to what extent a woman, who has been abandoned by her husband, may contract debts for which she is personally liable.

The law seems to be settled that when the wife is left without maintenance or support by the husband, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts. And the law is the same whether the husband is banished for his crimes or has voluntarily abandoned the wife. It is for the benefit of the *feme covert*, that she should be answerable for her debts, and liable to an action in such a case; otherwise she could not obtain credit, and would have no means of gaining a livelihood. A decision to this effect, by the court of common pleas, in England, is reported in 1 Bos. & Pull. 359. In delivering the opinions of the court, Mr. Justice Buller refers to the case of Lady Belknap, whose husband was exiled. She was permitted to sue in her own name. The husband of Lady Sandys was banished by act of parliament during life, and it was decreed, in her case, that she might in all things act as a *feme sole*, and as if her husband was dead; and that the necessity of the case required she should have such power, 1 Vernon, 104. And the same reason applying where the husband had abjured the realm, the wife, in that case, was allowed to sue as a widow for her dower. In such case, she has been permitted to alien her land without her husband; and is exempted from the disabilities of coverture. It has been uniformly considered that banishment, or abjuration, is a civil death of the husband. In the case of Deborah Gregory *v.* Paul, executor of Warburton, reported in the 15th volume of Mass. Rep. 31, all these cases are reviewed by the supreme judicial court

of Massachusetts, and the law recognized. In the case under consideration, there was a voluntary abandonment of the wife, by the husband, without having furnished her with the means of support. In his absence, she traded and dealt as a *feme sole*, and is liable for her debts. When the deed for the lot aforementioned was executed, her husband had been absent five years only, she continued under a coverture, and was the wife of Robert Erskine, her first husband. There is no evidence that she was, at that time, married to Daniel Rhea, and if the marriage had been proved, it would have been illegal and unavailing. A *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time, with impunity, until her husband shall have been absent seven [*109] years, and shall not have been heard of during that time.

But by the laws of Maryland, which must govern in this case, a married woman cannot dispose of real property without the consent of her husband; nor can she execute a good and valid deed, to pass real estate, unless he shall join her in the deed.

The separate examination, and other solemnities required by law, are indispensable, and must not be omitted. The deeds executed by her and Daniel Rhea, in May, 1819, are therefore inoperative and void.

The circuit court decreed, in this case, upon the bill annexed, and exhibits, without further testimony. They do not, in themselves, contain sufficient matter for a decree.

It does not appear that any evidence was taken on commission or otherwise, to establish or disprove the material allegations in their bill.

The record being thus defective, this court cannot make a final decision. The decree of the circuit court is reversed, and the record remanded for further proceedings.

SUNDRY AFRICAN SLAVES, THE GOVERNOR OF GEORGIA, Claimant, Appellant, *v.* JUAN MADRAZO. THE GOVERNOR OF GEORGIA, Appellant, *v.* SUNDRY AFRICAN SLAVES, JUAN MADRAZO, Claimant.

1 P. 110.

Where the chief magistrate of a State is sued, not by his name, but in his official character, and the claim is made upon him solely by reason of his holding the office of governor, and no decree could be made against him personally, the State must be considered as the real party on the record.

The case is stated in the opinion of the court.

Berrien, for the State of Georgia.

Wilde, for Madrazo.

[*118] *MARSHALL, C. J., delivered the opinion of the court.

Some time in the year 1817, Juan Madrazo, a Spaniard, residing in the Island of Cuba, engaged in the slave-trade, fitted out a vessel for the coast of Africa, which procured a cargo of Africans; and on its return, in the autumn of 1817, was captured by a privateer sail, under the flag of one of the governments of Spanish America, and carried into Amelia Island, where the vessel and cargo were condemned by a tribunal, established by Aury, the authority of which has not been acknowledged in this country. The Africans were purchased by William Bowen, and were conducted [*119] into the Creek nation; *within the limits of the State of Georgia, where they were seized by M'Queen M'Intosh, a revenue officer, at Darien, in Georgia, early in January, 1818, under the act of 1807,[1] which prohibits the importation or bringing into the United States, of any negro, mulatto, or person of color. This act annuls the title of the importer, or any person claiming under him, to such negro, mulatto, or person of color, and declares that such persons "shall remain subject to any regulation, not contravening the provisions of this act, which the legislatures of the several States or territories at any time hereafter may make for disposing of such negro, mulatto, or person of color."

In December, 1817, the legislature of Georgia passed an act which empowered the governor to appoint some fit and proper person to proceed to all such ports and places within this State as have, or may have, or may hereafter hold, any negroes, mulattoes, or persons of color as have been or may hereafter be seized or condemned under the above-recited act of congress, and who may be subject to the control of this State; and the person so appointed shall have full power and authority to receive all such negroes, mulattoes, or persons of color, and to convey the same to Milledgeville, and place them under the immediate control of the executive of this State.

The second section authorizes the governor to sell such negroes, mulattoes, or persons of color, in such manner as he may think most advantageous to the State.

The third directs that they may be delivered up to the Colonization Society, on certain conditions therein expressed; provided the application be made before the sale.

Under this act, the Africans brought in by William Bowen, were delivered up to the governor of Georgia, who sold the greater number of them and paid the proceeds, amounting to $38,000, into the treasury of the State. The Colonization Society applied for those remaining unsold, amounting to rather more than twenty, and offered

[1] 2 Stats. at Large, 426.

to comply with the conditions prescribed in the act of December, 1817.

In May, 1820, the governor of Georgia filed an information in the district court of Georgia, stating the violation of the act of congress; that the Africans were placed under the immediate control of the executive of the State, where they awaited the decree of the court. He states the application made on the part of the Colonization Society, with which he is desirous of complying, as soon as he shall be authorized to do so by the decree of the court.

In November, 1820, William Bowen filed his claim to the said Africans, alleging that they were his property; that they
*had not been brought into the United States in violation [*120]
of the act of congress, but were seized while passing through the Creek nation, on their way to West Florida.

In February, 1821, Juan Madrazo filed his libel, alleging that the Africans were his property; that, on the return voyage from Africa, they were captured by the privateer Successor, commanded by an American, and fitted out in an American port; that the vessel and cargo were carried into Amelia Island, and condemned by an unauthorized tribunal; after which they were brought by the purchaser into the Creek nation, where they were seized by an officer of the United States, brought into the limits of the district of Georgia, and delivered over to the government of that State, in pursuance of an act of the general assembly, carrying into effect an act of congress, in that case made and provided. That a part of the slaves were sold, and the proceeds, amounting to $38,000, or more, paid into the treasury of the State; and that the residue, amounting to twenty-seven or thirty, remain under the control of the governor.

The libel denies that the laws of the United States have been violated, and prays that admiralty process may issue to take possession of the slaves remaining under the control of the governor of Georgia; and that the governor and all others concerned should be cited to show cause why the said slaves should not be restored to Juan Madrazo, and the proceeds of those which had been sold paid over to him.

Upon this libel, a monition was issued to the governor of Georgia, who appeared and filed a claim on behalf of the State; in which he says that the slaves were brought into the State in violation of the act of congress, and that they were taken into the possession of the executive of the State in pursuance of the act of the state legislature, enacted to carry the act of congress into effect. That a number of the said slaves have been sold, and the proceeds paid into the

treasury, where they have become a part of the funds of the State, not subject to his control or to the control of the treasurer. That the residue of the said slaves, who remain unsold, have been demanded, under the law, by the Colonization Society.

Process was also issued against the Africans, but was not executed. The two causes came on together, and the district court dismissed the claim of Bowen, and also dismissed the libel of Madrazo, and directed that the slaves remaining unsold should be delivered by the marshal to the governor of the State, and that the proceeds of those sold should remain in the treasury.

Both Bowen and Madrazo appealed to the circuit court.

[*121] At the hearing in the circuit court, the sentence, dismissing *the claim of Bowen, was affirmed. That dismissing the libel of Madrazo was reversed, and a decree was made that the slaves remaining unsold should be delivered to him on his giving security to transport them out of the United States; and further, that the proceeds of those which were sold should be paid to him. From this decree the governor of Georgia and William Bowen have appealed to this court.

A question, preliminarily to the examination of the title to the Africans, which were the subject of these suits, and to the proceeds of those which were sold, has been made by the counsel for the State of Georgia. He contends that this is essentially, and in form, a suit against the State of Georgia; and therefore was not cognizable in the district court of the United States.

The process which issued from the court of admiralty not having been executed, the *res* was never in possession of that court. The libel of Madrazo, therefore, was not a proceeding against the thing, but a proceeding against the person for the thing. This appeal carried the cause into the circuit court, as it existed in the district court, when the decree was pronounced. It was a libel demanding personally, from the governor of Georgia, the Africans remaining unsold, and the proceeds of those that were sold, which proceeds had been paid into the treasury.

Pending this appeal, the governor filed a paper in the nature of a stipulation, consenting to hold the Africans claimed by the libel of Madrazo, subject to the decree of the circuit court, if it should be determined that the claim in the circuit court had priority to sundry executions, levied on them by the sheriff of Baldwin county. Had this paper been filed in the district court, it would have been a substitute for the Africans themselves; and would, according to the course of the admiralty, have enabled that court to proceed in like manner as if its process had been served upon them. The libel

would then have been *in rem.* Could this paper, when filed in the circuit court, produce the same effect on the cause?

We think it could not.

The paper in nature of a stipulation is a mere substitute for the process of the court, and cannot, we think, be resorted to where the process itself could not be issued according to law. The process could not issue legally in this case, because it would be the exercise of original jurisdiction in admiralty; which the circuit court does not possess.

This cause therefore remained in its character a libel against the person of the governor of Georgia, for the Africans in his possession as governor, and for the proceeds in the treasury, of those which had been sold. Could the district court exer- [*122] cise jurisdiction in such a cause?

Previous to the adoption of the 11th amendment to the constitution, it was determined that the judicial power of the United States extended to a case in which a State was a party defendant. This principle was settled in the case of Chisholm *v.* Georgia, 2 Dal. 419. In that case, the State appears to have been nominally a party on the record. In the case of Hollingsworth *v.* Virginia, also, in 3 Dal. 378, the State was nominally a party on the record. In the case of Georgia *v.* Brailsford, 2 Dal. 402, the bill was filed by his excellency Edward Telfair, Esq., governor and commander-in-chief, in and over the State of Georgia, in behalf of the said State. No objection was made to the jurisdiction of the court, and the case was considered as one in which the supreme court had original jurisdiction, because a State was a party. In the case of New York *v.* Connecticut, 4 Dal. 3, both the States were nominally parties on the record. No question was raised in any of the cases respecting the style in which a State should sue or be sued; and the presumption is that the actions were admitted to be properly brought. In the case of Georgia *v.* Brailsford, the action is not in the name of the State, but it is brought by its chief magistrate in behalf of the State. The bill itself avows that the State is the actor, by its governor.

There is, however, no case in which a State has been sued without making it nominally a defendant.

Fowler *et al. v.* Lindsey *et al.*, 3 Dal. 411, was a case in which an attempt was made to restrain proceedings in a cause depending in a circuit court; on the allegation that a controversy respecting soil and jurisdiction of two States, had occurred in it.

The court determined that a State, not being a party on the record, nor directly interested, the circuit court ought to proceed in it. In the United States *v.* Peters, the court laid down the principle,

that although the claims of a State may be ultimately affected by the decision of a cause, yet if the State be not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction.

In the case of Osborne *v.* The Bank of the United States, 9 W 738, this question was brought more directly before the court. It was argued with equal zeal and talent, and decided on great deliberation. In that case, the auditor and treasurer of the State were defendants, and the title of the State itself to the subject in contest was asserted. In that case the court said: "It may, we think, be laid down as a rule which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party [*120] named in the record." The court added: *"The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

The information of the governor of Georgia professes to be filed on behalf of the State, and is, in the language of the bill, filed by the governor of Georgia on behalf of the State against Brailsford.

If, therefore, the State was properly considered as a party in that case, it may be considered as a party in this.

The libel of Madrazo, alleges that the slaves which he claims "were delivered over to the government of the State of Georgia, pursuant to an act of the general assembly of the said State carrying into effect an act of congress of the United States, in that case made and provided; a part of the said slaves sold, as permitted by said act of congress, and as directed by an act of the general assembly of the said State; and the proceeds paid into the treasury of the said State, amounting to $38,000, or more."

The governor appears, and files a claim on behalf of the State, to the slaves remaining unsold, and to the proceeds of those which are sold. He states the slaves to be in possession of the executive, under the act of the legislature of Georgia, made to give effect to the act of congress on the subject of negroes, mulattoes, or people of color, brought illegally into the United States; and the proceeds of those unsold to have been paid in the treasury, and to be no longer under his control.

The case made, in both the libel and claim, exhibits a demand for money actually in the treasury of the State, mixed up with its general funds, and for slaves in possession of the government. It is not

alleged, nor is it the fact, that this money has been brought into the treasury, or these Africans into the possession of the executive, by any violation of an act of congress. The possession has been acquired by means which it was lawful to employ.

The claim upon the governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially.

The decree is pronounced not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the * State itself may be con- [* 124] sidered as a party on the record. If the State is not a party, there is no party against whom a decree can be made. No person, in his natural capacity, is brought before the court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.

But were it to be admitted that the governor could be considered as a defendant in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the State, made for the purpose of giving effect to an act of congress; and has done nothing in violation of any law of the United States.

The decree is not to be considered as made in a case in which the governor was a defendant in his personal character; nor could a decree against him, in that character, be supported.

The decree cannot be sustained as against the State, because, if the 11th amendment to the constitution does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the supreme court. It cannot be sustained as a suit, prosecuted not against the State but against the thing; because the thing was not in possession of the district court.

We are therefore of opinion that there is error in so much of the decree of the circuit court as directs that the said slaves libelled by Juan Madrazo, and the issue of the females now in the custody of the government of the State of Georgia, or the agent or agents of the said State, be restored to the said Madrazo, as the legal proprietor thereof, and that the proceeds of those slaves who were sold by order of the governor of the said State be paid to the said Juan Madrazo,

and that the same ought to be reversed; but that there is no error in so much of the said decree as dismisses the information of the governor of Georgia, and the claim of William Bowen.

JOHNSON, J., *dissentiente.*

By the new and unexpected aspect which this cause has assumed in this court, I feel myself called upon to accompany the report of this decision with a brief explanation. Such an explanation appears necessary, not less in vindication of the course pursued by the State of Georgia than of the judicial course of the circuit court, over which I have the honor to preside.

By the state of facts as now exhibited, it would appear as if the court of the sixth circuit of the district of Georgia had been taking very undue liberties, both with the executive and treasury [* 125] departments of that State; and that two of the * governors of that State, acting in behalf of the State, had first come voluntarily into the courts of the United States, and then, only because the decision of that court was against the rights they asserted, repudiated their own act, and denied the jurisdiction of the very court which they had voluntarily called to decide on their rights.

Yet nothing can be further from the truth of the case. The real exposition of the incidents to the cause, lies in this; that the actual *promovent contestatio litis*, was the colonizing society; that Georgia, at least, in its inception, had no interest in it; that the governor only regarded himself as a stakeholder to the three disputants who claimed the property. The slaves, as well as the proceeds of those which were sold, it is notorious, have, in fact, been delivered up by the State to one of these claimants.

It is true, that in this point the legislature of the State has differed in opinion on the question of right, from the court that tried the cause, and surrendered them to Bowen, instead of Madrazo; but this fact proves that she was not contending for herself.

There is no necessity, however, for speaking out of the record on this subject. The information, as well as the claim, filed to Madrazo's libel, both explicitly avow that, as to the slaves remaining unsold, the governor was acting in behalf of the colonizing society; and had not the decision below been against their claim, and on grounds which cannot be shaken, it is fair to conjecture that the exception here taken to the jurisdiction would never have been suggested; nor, had that society possessed a legal existence, so as to prosecute a suit in its own name, is there the least reason to believe that the governor of Georgia would ever have presented himself in the courts of the United States upon this subject?

What could he do? This property had come legally into the hands of his predecessor—a part had been sold—and the rest transmitted to him specifically. Two parties presented themselves, claiming it in their respective rights; and having been constituted by law the guardian of the rights of one, he presents himself to the only court that could take cognizance of the cause, in order to have the question of right decided before he would surrender the slaves, in his possession, to either claimant. The money raised from the sales, he disavows having any control over.

But, in the progress of the cause, incidents occur which produce a total change in the views and interests of parties. A third party arises, and, on the clearest proofs and best established principles, has made out the proprietary interest to be in himself. An appeal is taken to this court; and, pending the appeal, * the [*126] party who had failed in every court below, and must fail wherever the rights are subjected to judicial cognizance, succeeds in prevailing on the legislature to abandon the property to him.

Thus, then, the colonizing society have lost all hopes from a suit at law; Bowen has obtained the property; the legislature that gave it to him can, at least, feel no desire to have Madrazo's rights confirmed in this court; and all became interested in overturning their own work, and crushing Madrazo's interest under the ruins.

It is certainly a purpose which cannot be willingly favored in a court of justice; and I meet it with the most thorough conviction that the law is not with the appellants on the objections to the jurisdiction of the court below, which have now, here, for the first time, been moved and argued.

There are two exceptions taken to the exercise of jurisdiction, in the court below:—

1. That a State was a party, &c.

2. That the jurisdiction of the district court never attached, because the *res subjecta* was never actually in possession of that court.

The facts were these: the negroes were certainly brought into the United States, in contravention of the act of congress of 1807. That act creates a forfeiture, inasmuch as it devests the owner of all property in the slaves so brought in; and by another provision, it is left to the States to dispose of such persons of color in any manner they may think proper, not contravening the provisions of that act. The State of Georgia, by law, authorized their governor to appoint an agent to receive such persons of color, and deliver them to the executive to be sold, unless applied for by the colonizing society; and, if so applied for, then to be delivered into their possession.

These slaves were seized by a revenue officer of the United States,

and voluntarily delivered to Governor Rabun, then governor of Georgia; who had sold all, except about thirty, before the society applied to him, agreeably to the provisions of the act.

The Georgia law contains no express instructions to the governor, how to dispose of the proceeds of the sales. It authorizes him to sell, after sixty days' notice, "in such manner as he may think best calculated for the interest of the State;" but whether for cash, or credit, or to remain in, or be shipped from the State, be meant by this provision, there are no means of determining. The money was, in this instance, paid into the treasury; or at least, so the [* 127] governor alleges, in his claim * to the Madrazo libel; and so we are bound to consider the facts.

Here, then, was a case of forfeiture under a law of congress; and the governor of the State legally authorized to sue for and recover the thing forfeited, and "when seized and condemned," as the Georgia law expresses it, to sell it on one state of facts; on another, to deliver it to the colonizing society. Who was to sue for this forfeiture, if not the State, or the governor, as its representative? The society could not, for it had no existence in law.

The governor, accordingly, sold the greater part; and his successor filed an information in the district court of the United States to have the residue condemned, that he might deliver them to that society. To this libel and information Bowen filed his claim and answer; and, while that suit was pending, Madrazo filed his libel in the district court, praying process against the Africans remaining in the governor's hands, and the proceeds of those which were sold. On this libel a warrant of arrest was issued against the slaves, and a monition to the governor and all concerned, in relation to the whole subject of Madrazo's claim.

The warrant of arrest was not served in the district court; but Governor Clarke, successor of Governor Rabun, appeared to the monition, without protest, and filed a claim to the Africans, in behalf of the society; as to the proceeds of those which had been sold, he simply answers, that they had been paid into the treasury, where they remained mixed up with the treasure of the State, and beyond his control.

The pleadings were in this state when the district judge entered upon a plenary hearing of the case, taking into view the information of the governor with Bowen's claim, and the libel of Madrazo with the governor's claim and answer; and thereupon sustained the information, and dismissed Bowen's claim, and Madrazo's libel.

Bowen and Madrazo appealed; and, on the hearing in the circuit court, where a body of new evidence was introduced, the decree of

the district court was reversed, and the information and Bowen's claim dismissed.

But having proceeded so far, the circuit court found itself thus situated.

As the district court had sustained the information, it would have been nugatory to enforce its warrant of arrest upon the slaves, since they were already in possession of the State. Madrazo's libel being dismissed in that court, no further steps were taken to render the *res subjecta* into actual possession.

But, when the information was dismissed, and *Madrazo's [*128] libel sustained in the circuit court, it followed that it was error in the district court not to have enforced the service of the warrant of arrest on the slaves, or done some equivalent act. Thus situated, the circuit court could not send back the cause; because, by the 24th section of the Judiciary Act of 1789,[1] the circuit court is required to go on and make such decree as this district court ought to have made. That court thought that the obligation to perform this duty carried with it all the incidents necessary to perform it, and ordered process accordingly. To this the governor again, without protest, responded, by voluntarily entering into a stipulation to hold the slaves subject to the order of that court, and then the court, considering itself legally in possession of the *res*, made the decree in favor of Madrazo, which is here brought up for revision.

On the question of right, upon the evidence before the circuit court, there can scarcely be two opinions. The cargo was Madrazo's — it was captured by a privateer — fitted out in Baltimore — run into Fernandina — there sold to Bowen — carried across the country to the Creek agency, within the limits of the United States, and where its jurisdiction attached, notwithstanding the Indian title existed; and, although Bowen, the tortious owner, committed an offence by introducing them into the country, Madrazo was not privy to that offence, and was innocent of any act that could work a forfeiture of his interest.

But the question now to be considered is exclusively that of jurisdiction; and it is insisted, first, that as the State was a party, and the party defendant in both cases in the circuit court, that court could not maintain jurisdiction of the subject.

That a State is not now suable by an individual, is a question on which the court below could not have paused a moment.

The 11th amendment to the constitution put that question at rest forever. But where is the provision of the constitution which disables a State from suing in the courts of the Union?

[1] 1 Stats. at Large, 85.

The second section of the third article, extends the judicial power of the United States to all cases arising under the law of the United States, and to all cases of admiralty and maritime jurisdiction; to controversies between two or more States, between a State and citizens of another State — and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

It is true, the next section provides that, in all cases in which a State shall be a party, the supreme court shall have [* 129] *original jurisdiction. But it is obvious that original does not mean exclusive; and, in the 13th section of the Judicial Act of 1789, it is so treated; since the legislature there declares in what instances the jurisdiction of the supreme court shall be exclusive, and in what concurrent, when a State is a party. The words of that section are: "The supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, and aliens; in which latter case, it shall have original, but not exclusive jurisdiction."

Now, considering this section in connection with the constitution, it is obvious that the word exclusive, there used, must be considered as applying solely to the courts of the United States; since it never could have been imagined that the States were to be restricted from suing in their own courts, or those of their sister States; and thus construed, it must carry the implication that the States may sue in any other courts of the United States, in cases comprised within the jurisdiction vested in those courts, by the Judiciary Act; provided the cause of action, or the parties, be such as bring the suit within the cases to which the judicial power of the United States is extended by the constitution.

In a suit against an alien, then, there can be no question that a State may sue in the circuit court; and must prosecute a suit there, if the alien chooses to assert the right of transfer secured to him under the 12th section of that act.

And so with regard to suits against consuls and vice-consuls, it is perfectly clear that the suit of a State must, if the defendant insists upon his right, be prosecuted in the district courts of the United States.

The 9th section of the act, being that which prescribes the jurisdiction of the district courts, is explicit on this point. But that section embraces other cases, in which, without any strained construction, the States may assert the rights of a suitor in the district court.

The words of the section are: "The district courts shall have exclusive original cognizance of all civil causes of admiralty, and

maritime jurisdiction, including all seizures under laws of impost, navigation, and trade of the United States, where seizures are made on waters, &c.; and shall also have exclusive original cognizance of all seizures on land, &c.; and of all suits for penalties and forfeitures, incurred under the laws of the United States."

Now it is very clear that wherever the district court is vested with "exclusive original cognizance," the supreme court can possess no original jurisdiction; and such is clearly the * case [* 130] with regard to seizures, and suits for forfeitures, under the laws of the United States, and suits in the admiralty. And unless some reason can be shown why a State should not prosecute a suit for a forfeiture, under the laws of the United States, it follows, with regard to the information, that the jurisdiction was rightfully exercised by the district court in the present instance. The admiralty suit shall be separately considered. But why may not a State prosecute a suit for a forfeiture under a law of the United States? Take the cases of a law of congress passed to aid the States in the collection of a tonnage duty; or of a penalty, under their inspection laws. In the one case, there may be a seizure on the water, and in the other, on the land; in either, there may be a suit for a forfeiture; and in all, the penalty might very rationally be given to the State, or its prosecuting officer. The present, so far as it involves the question on the information, is precisely one of those cases. Here was a forfeiture incurred under a law of the United States; and the benefit of it was consigned to the States if they chose to accept it. Here the State did not accept it, and authorized their executive to assert the rights derived under the law of congress.

An examination of the exceptions in the 13th section of the act, which marks out the jurisdiction of the supreme court, will throw light upon this subject. The language of the section is: "That the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except, also, between a State and citizens of other States, or aliens; in which latter case it shall have original, but not exclusive jurisdiction."

Now it may seem unaccountable, at first view, why these exceptions should have been extended to controversies between a State and its own citizens; since controversies between a State and its own citizens is not one of the subjects of jurisdiction enumerated in the constitution. And the solution is to be found in this, that the grant of jurisdiction, as to cases arising under the constitution, laws, &c., of the United States, and of admiralty and maritime causes, is not restricted to or limited by any relation or description

of persons. Controversies, in these branches of jurisdiction, may therefore, by possibility, arise between a State and its own citizens; certainly between a State and the citizens of other States, or aliens, under the laws of the Union or in admiralty and maritime cases.

As the law regards this information as a civil suit, *in rem*, on the exchequer side of the admiralty, and it was grounded on a law of congress, the citizenship of the claimants can have no influ-
[*131] ence on the question of jurisdiction. I think, *however, that it appears somewhere in this voluminous record that Bowen was a citizen of Georgia; but whether of that State, a sister State, or a foreign state, the controversy, if it be regarded as one with individuals, is expressly excepted from the exclusive jurisdiction of the supreme court; and I must think is within the original jurisdiction of the district court. And if so, it follows that the State must, upon appeal from a decision there made in its favor, assume the attitude of a defendant in any court into which the cause may be legally carried by appeal or writ of error.

In England, the king cannot be sued, yet he is daily brought before the appellate courts as a defendant in error. It has long since been decided that this is legal. And thus, too, the United States continually appears upon the docket of this court as a party defendant; and, for the same reason, although not suable originally, yet upon a judgment obtained, injunctions have been granted against parties who could not otherwise have been made defendants; as, for example, the United States.

The thing is unavoidable — it is incident to the right of appeal. Justice could not be administered without it. There would be no reciprocity — the law would operate unequally, and to the prejudice of the citizen.

There is no compulsory process used to produce this reversed, I may say, nominal, state of parties. The cause is removed by a citation, or other less offensive process, and the party appears in the superior court if he will — if not, the cause is disposed of without an appearance.

So much for the information, and the appeal from the district court upon it. We will now consider the rights of the State, in the relation in which it stood to Madrazo's libel. I am considering the State, and not the officers of the State, as the real party to the record.

When Madrazo's libel was filed, the governor's information was pending; and as Madrazo's libel sets out the seizure and delivery of the slaves to the executive of Georgia, and the claims advanced to the proprietary interest therein; it was properly considered in the

district court in connection with the information, and in the double aspect of a claim and libel. In the case of The Antelope, the cross libel of the Portuguese was treated, reciprocally, as claim and libel. Considered in the relation of a claim to the information, it is impossible to deny that, if the State rightly preferred the information, it must have been bound by the decisions, both of the district court and of the tribunal to which an appeal lay from the decision of the district court upon that information, as regarded the rights of the claimants.

* And if we consider Madrazo's libel in the aspect of a suit [* 132] in the admiralty, it appears to me impossible to assign a sufficient reason why the State should not be equally bound.

The property or possession of the State had been acquired under a capture at sea — a maritime *tort*. It was, therefore, clearly a case of admiralty jurisdiction. Where, then, is the limit to this branch of the jurisdiction of the district court? No personal relation, description, or character imposes any such limit. The grant of jurisdiction to the United States, and by the United States to the district court, is without restriction, and it would be singular if a State should be precluded from the right of appearing to assert its rights before that tribunal. Suppose the case of a capture of a library shipped to a State, and a recapture and libel for salvage; surely, in some form or other, the State must have a hearing. There is nothing compulsory upon the State — the right may be abandoned if it will; but, after preferring a claim, will it be contended that it may withdraw itself from the contest under an assertion of state immunities, to the prejudice of individual right? This is not a new question in the admiralty — it is considered by Godolphin, who observes "that for the same party in the same cause to surmise and move for a prohibition against that jurisdiction to which himself had formerly submitted, and in a cause which, by the libel, appears not other than maritime, seems quite beside the rule and practice of the law." Jurisd. of the Adm. pp. 116, 117, and the two adjudged cases of Jennings and Audley, Brownl. pt. 2, p. 30, and Baxter and Hopes, *Ibid.*, which he cites, do fully establish "that, in all cases where the defendant admits the jurisdiction of the admiralty court by pleading, then prohibition shall not be granted, if it do not appear that the act was done out of the jurisdiction."

Now, in this case the State appeared, and claimed to the monition without protest. In the admiralty, a claimant is an actor; and, had the decision of the district court been affirmed, the State would have had the full benefit of this interposition as a party. And again, at a subsequent period, the State voluntarily surrendered the *res* to the circuit court, and took it out again on stipulation, &c., and, had not

this exception now been taken, would have had all the benefit of a decree of restoration, if made by this court. But it is insisted that consent cannot give jurisdiction; that this is a sound rule, and as applied to the common law courts cannot be controverted. But is it so in the admiralty?

It must be recollected that the common law courts have themselves released this rule in relation to the admiralty. I allude to the controversy on the subject of the stipulation bonds, which was [*133] finally abandoned, on the ground of the assent * of the party, stipulating to submit to the jurisdiction of that court. These decisions seem fully in point to the present case; 2 Brown's Civ. & Adm. Law.

But in the proceedings, *in rem*, the admiralty wants no consent or concession to enlarge its jurisdiction. All the world are parties to such a suit, and bound by it by the common consent of the world. The interest of a State or the United States, in the *res subjecta*, must be affected by such a decision. The question will now be considered whether the want of an actual reduction of the *res* into possession, in the district court, deprived that court of jurisdiction; or whether, if it did, that circumstance would affect the appellate jurisdiction of the circuit court. Also, whether, on the reduction of the *res* into possession, there was any assumption of original jurisdiction in the circuit court?

On these points I cannot bring myself to feel a doubt, since the very failure in the district court to grant process for reducing the *res* into possession, would be such a *damnum irreparabile* as would sustain an appeal to the circuit court. Otherwise, the very ground of appeal — that which gives jurisdiction — would take it away. And what, upon an appeal, would be the course of the circuit court upon such a case? It has no power to remand the cause; for the 24th section requires that "when a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed." This section, I must believe, necessarily substitutes the circuit for the district court, upon a reversal, and vests it with power to do whatever that court could have done or ought to have done, originally. It is very important here to notice that not reducing the *res* into possession in the district court was the necessary consequence of its first error, in sustaining the information and dismissing Madrazo's libel. For if Madrazo's pretensions were to be considered as rejected, there could be no reason for pursuing the means of reducing the *res* into possession in the district court; and while the cause was in the circuit court, that necessity did not arise, for the same reason,

until the decree was passed for reversing the decree of the district court and dismissing the information. Thus circumstanced, the power given and duty imposed by the 24th section could not have been exercised otherwise than it was. The circuit court alone could proceed to do justice between the parties, and become *quo ad hoc*, vested with original powers.

The question, as it regards the proceeds of the Africans sold, is one of more nicety. For the proprietary interest in the negroes unsold could well be disposed of after the court *became [*134] actually possessed of them. The court was not at liberty to doubt that the stipulation would have returned the slaves, specifically, upon monition. But the proceeds of those sold we must suppose had been paid into the treasury; and there is no doubt that the court could not and would not have attempted, by compulsory process, to get at it. Yet, was this a sufficient reason for not proceeding to adjudicate upon the question of right? I think not.

It must be noticed here that the head of the government had omitted no firm or legal means to give authenticity to the submission of the State to the jurisdiction of the court. The letters of procuration, executed by both Governor Clarke and his successor, Governor Troup, in due form, are on the files, expressly authorizing, in the name of the State, all the acts of certain proctors of that court, in the name and behalf of the State.

The governor's answer, then, was the answer of the State; and when the answer avows that many of the slaves were sold, and the money paid into the treasury, what is it but acknowledging that the property of Madrazo no longer remains in specific existence, but has been sold and appropriated by the respondent under such circumstances as convert Madrazo's rights into a pecuniary demand — a debt due by the State? Now, the State could stand in no other relation to Madrazo, in this behalf, than Bowen or the captor would have stood, had the sale been made by them; and can it be supposed that a similiar answer from either Bowen or the captor would have deprived the court below of its jurisdiction?

It is almost a work of supererogation to resort to precedents on such a question; but if necessary there is no want of precedents to prove that the district court was bound to go on, and render justice to the libellant, according to the forms of the admiralty, as far as it could proceed.

The case of Monro *v.* Almedia, decided in this court in 1825, was just such a case, 10 W. 473. There it was fully considered whether the court might go on, and how to proceed, and the cause was remanded to the circuit court for further proceedings. The libel charged

a seizure and appropriation of a sum of money on the ocean; and the respondent appeared under protest, and, by demurring, admitted as true what the answer here avows to be true.

And strongly analogous is the case of M'Kenzie *v.* Livingston and Welsh, reported in a note to the 3d Term Rep. 333, in the case of Smart *v.* Wolf, in which M'Kenzie preferred a libel in the vice-admiralty court, in Jamaica, to obtain condemnation of a sum of money captured by him, and not paid into the registry of the court. Livingston and Welsh filed a claim, and that court decreed to them [*135] "the sum of £1300, *in the possession of the captor." M'Kenzie appealed to the lords commissioners, who affirmed the decree below, and the cause was remitted for further proceedings.

In that case, the *res* was avowedly out of possession of the court; and yet, upon the submission of the party who held it, the court entertained jurisdiction, and decreed upon the cause; as if the claimant had been libellant, and the libellant stood in his place.

When money is the thing in contest, or the thing captured has been converted into money, it becomes essentially a debt; and, of course, a metaphysical thing—not to be arrested specifically.

Upon this view of the subject, the district court might have exercised jurisdiction over the whole capture; and did entertain jurisdiction, in the very act of dismissing the libel, upon the question of right. Then, when the whole cause was brought by appeal before the circuit court, I hold that the circuit court was bound to go as far as it could go, without intrenching upon the sovereign rights of the State; which, for the purposes of justice, had thus consented to enter into the litigation between these parties;—that is, as far as a decree.

Had not the progress of the court been arrested by this appeal, it could certainly have gone no further than to issue its monition. But it cannot be doubted that, upon Madrazo's petitioning the legislature on the subject, their officers would have been instructed to dispose of the property and money according to the decree of the court. Subsequent events, however, have given a new aspect to things; and Madrazo, with abundant proofs of his rights, is left without remedy.

Decree. These causes came on, &c., on consideration whereof, this court is of opinion that there is error in so much of the decree of the said circuit court as directs restitution of the slaves libelled by Juan Madrazo, and the issue of the females, in the custody of the government of the State of Georgia, or the agent or agents of the said State, and that the proceeds of those slaves, who were sold by order of the government of the said State, be paid to the said Juan Madrazo; the circuit court not having jurisdiction of a cause in

which the plaintiff asserts a claim upon the State; and that the same ought to be reversed and annulled; and the libel of the said Juan Madrazo is ordered to be dismissed. And this court is further of opinion that there is no error in the residue of the said decree, and the same is hereby affirmed; and it is further considered and ordered, that the said cause be remanded to the said circuit court, with directions for further proceedings to be had thereon, according to law and justice, in conformity to this opinion.

2 H. 9; 17 H. 284.

JOSEPH MANDEVILLE, one of the firm of Richard Slade and Co., Plaintiff in Error, *v.* GEORGE HOLEY AND THOMAS SUCKLEY, joint merchants in trade, under the firm of Holey and Suckley, Defendants in Error.

1 P. 136.

In Virginia, a confession of judgment is a release of errors.

ERROR to the circuit court for the county of Alexandria in the District of Columbia, in an action of *assumpsit*, in which the damages were laid at $10,500. The defendant, after some preliminary proceedings, confessed a judgment for $11,695.25.

Swann, for the plaintiff.

Taylor, contrà.

* MARSHALL, C. J., delivered the opinion of the court. [* 137]

The court are satisfied in this case that, under the law of Virginia, a confession of judgment by the plaintiff in error, in the original suit, is a release of errors.

Judgment affirmed, with costs and damages, at the rate of six per cent. per annum.

JAMES GREENLEAF, Appellant, *v.* NICHOLAS L. QUEEN, AND ELEANOR, his wife, Heirs, AND RICHARD WALLACK, Administrator of Washington Boyd, deceased, Appellees.

1 P. 138.

Though a trustee to sell must, as against his *cestuis que trust*, pursue the mode of sale specified in the deed of trust, yet a purchaser cannot object to the title upon the ground of a departure from that mode, if the *cestuis que trust* have sanctioned it.

A contract to sell to a third person three years previous, which has manifestly been abandoned by him, so that he could not compel a specific performance, is not a valid objection to a title.

Nor is a claim for dower, if the purchaser knew or had the means of knowing its existence, and was aware he was purchasing of a trustee

If the original trustee is dead and another is appointed by the court, pending a suit to execute the trust, a supplemental bill should be filed, and a release required from the heir at law of the original trustee.

THE case is stated in the opinion of the court.

Jones, for the appellant.

Key, contrà.

[* 141] * WASHINGTON, J., delivered the opinion of the court.

This cause comes from the circuit court of the District of Columbia, for the county of Washington. The appellant

[* 142] filed * his bill in that court, against Washington Boyd, setting forth that, on the 19th of March, 1817, the said Boyd, as trustee under a deed of Charles Minifie to him, entered into a contract with the plaintiff, for the sale of sundry lots in the city of Washington, at the price of $3,500, payable in six, twelve, and eighteen months; for which, including the interest, and amounting in the whole to $3,815, he then gave his note to Boyd, who acknowledged the receipt thereof by an instrument under his hand; and thereby agreed that, on the payment of the note, he would convey to the plaintiff the said lots, which had been previously sold at public auction, two of them to Elliot, as agent for the plaintiff, and the others to Francis Jameson, William Prout, and Z. Walker. That although the title to these lots which had been sold to Jameson, Prout, and Walker, had not been released from their claims, the defendant, Boyd, had nevertheless recovered a judgment against the plaintiff for the amount of his note before mentioned, upon which he threatened to sue out an execution. The prayer of this bill was for an injunction, and a conveyance of the lots with a clear title.

The plaintiff afterwards filed an amended bill, setting forth the original negotiations between the plaintiff and Boyd, in March, 1816, for the purchase of the above lots, which resulted in a contract, by which the plaintiff was to be considered as the purchaser of them, at the price of $3,500, payable, with interest, in six, twelve, and eighteen months. That the defendant had, nevertheless, thought proper to expose the said lots to sale at public auction, sometime in April, 1816, and had caused Elliot, the plaintiff's agent, to be set down as the purchaser of two of the lots only, at the price of $3,500, although neither Elliot nor the plaintiff was present; and that the remaining seven lots were struck off, three of them to Jameson at $159, one to Prout at $45.15, and the remaining three to Walker at $264.90, making in the whole the sum of $4,019.05.

That matters remained in this situation until the 19th of March,

1817, when the written contract mentioned in the original bill was entered into.

The bill then sets forth the judgment obtained by Boyd against the plaintiff, upon his note for the purchase-money of the lots, and the deposit by the latter with the former of certain securities as collateral security for the debt, in consideration of a suspension of the execution until sometime in December, 1819. It further charges, that the plaintiff was ignorant of the title and authority of the defendant to dispose of the above property until within a few days preceding the filing of this amended bill; when, upon examining the land records of the county, he found the deed of trust from Charles Minifie and one James Ewell and * Z. Farrell, to the said [*143] Boyd, conveying the above lots to him in trust, to dispose of the same at public sale, on six, twelve, and eighteen months' credit, and to apply the proceeds to the payment of the debts of the said Minifie, and to hold what might remain after such payments, subject to the decree of the circuit court of the said district and county, in the suit brought by the wife of said Minifie for alimony; and the balance, if any, to be paid over to said Minifie. The bill then concludes by charging that the contract made by the plaintiff with the defendant, for the purchase of the said lots, is void, because it was made in contravention of an injunction obtained by Mrs. Minifie, and because the purchase by the plaintiff was made at private and not at public sale; that the title is likewise defective for the same reasons, and because the property is subject to the claim of Mrs. Minifie for alimony and for dower, and is not released from the claims of Prout, Jameson, and Walker, to the seven lots sold to them. The prayer of this bill is, that the contract may be declared void; that the judgment upon the plaintiff's note may be perpetually enjoined; and that the pledged securities may be restored to the plaintiff.

The injunction asked for was granted, till further order. A petition was filed in the same court, by William Prout and others, creditors of Charles Minifie, setting forth the death of Washington Boyd, leaving Eleanor, the wife of Nicolas L. Queen, his heir at law; and praying that another trustee might be appointed to complete the execution of the trusts of the deed from Minifie to Boyd. To this petition, Queen and his wife appeared and filed an answer, admitting the truth of the allegations in the petition, that the said Eleanor is the heir at law of Boyd, and submitting to such decree as the court might think proper to make.

That cause being set for hearing on the petition and answer, the court, on the 21st January, 1823, made a decree by which Richard Wallack was appointed trustee in the place of Washington Boyd,

deceased, upon his giving bond and security; with authority to complete the trusts left unexecuted by Boyd, according to the provisions of the trust deed, and to recover and collect the purchase-money for such of the trust property as had been sold by Boyd; and upon the payment thereof to convey said property, by a good and sufficient deed, in fee, to the purchasers thereof, and to bring the said proceeds of sale into the court, to be distributed as the said court might direct, according to the deed of trust. A bond was accordingly executed by Wallack, approved by one of the judges of the court, and filed amongst the proceedings in that cause; a transcript of which proceedings was made an exhibit in this cause; on the same day the above decree was passed, the court [*144] decreed, in *this cause, that the plaintiff should, on or before a certain day, proceed in the same, by making the heirs of Washington Boyd defendants, as also such other persons as might be necessary to enable the court to decree therein; otherwise that the bill of the plaintiff should be dismissed.

In May, 1824, the plaintiff filed a bill of revivor against N. L. Queen and Eleanor his wife, heir at law of Washington Boyd, and Richard Wallack, administrator of the said Boyd; to which bill Queen and wife appeared, and by consent of parties the answer filed by them to the petition of Prout and others was received as an answer to the bill of revivor, and the original suit was agreed to stand revived.

The cause was then set for hearing on the bills, answer, and exhibits, and all the proceedings in this cause, and also in the petition of Prout and others before mentioned; whereupon the court decreed that Richard Wallack, the trustee appointed by the order of the 21st of January, 1823, should execute a good and sufficient deed to the plaintiff, for the property sold to him by Boyd, the former trustee, according to the terms of that sale, to be approved by one of the judges of the court; to be filed with the clerk; and to be delivered to the plaintiff, upon the payment of the purchase-money; that he should also obtain and file with the clerk, a sufficient deed of release by Zachariah Walker, to be approved as aforesaid, to the plaintiff, releasing all title and claim to any and every part of the property of Charles Minifie, sold by Boyd as his trustee; and that upon the said deeds being executed, approved, and filed, as aforesaid, the injunction granted in this cause should be dissolved, and the trustee be authorized to proceed to levy and collect the amount of the judgment for the purchase-money, as mentioned in the bill. The decree then proceeds to dismiss the bill with costs; and that, before proceeding to collect the said purchase-money, a good and

sufficient bond should be executed, in the penalty of $500, by any one or more of the creditors, with security, to be approved by one of the judges of the court, with condition to indemnify the plaintiff, his heirs and assigns, from all claim and demand of Francis Jameson, his heirs and assigns, to any part of the lots or property mentioned in the deed of the said Wallack to Greenleaf, which might have been purchased by the said Jameson, at the sale of Washington Boyd, and filed with the clerk of the court. From this decree the plaintiff appealed to this court. A deed by Richard Wallack to James Greenleaf, bearing date the 2d of August, 1825, a bond of indemnity executed by Jonathan and William Prout, and a deed of release by Z. Walker, as directed by the aforesaid decree, dated the 3d and 7th of February, 1825, were executed, approved, and filed with the clerk of the court, in conformity * with [* 145] the decree, and form parts of the record brought up by this appeal.

The first objection made by the appellant's counsel to the decree of the court below is, that the contract between the appellant and Washington Boyd, for the sale of the lots mentioned in the bill, was void, for want of authority in the latter to dispose of the property in any other mode than at public auction. Such, it must be acknowledged, is the mode prescribed by the deed of trust; nor can it be questioned but that the trustee was bound to conform to this as well as to the other requisitions of the deed under which he professed to act. This was the test of value which the grantor thought proper to require; and it was not competent to the trustee to establish any other, although by doing so, he might, in reality, promote the interest of those for whom he acted.

But what are the facts in the present case?

The nine lots which formed the subject of the correspondence between the appellant and the trustee, in March, 1816, and of the written contract, on the 19th of March, 1817, were actually advertised, as directed by the deed of trust; were set up for sale, as the amended bill alleges, at public auction, in April, 1816, and were sold for the sum of $4,019.05. Two of them were set down to S. Elliot, the agent of the appellant, at the price of $3,500; and the other seven were struck off to Jameson, Prout, and Walker, for the remaining sum of $519.05.

It is not even charged in the bill, much less is there any proof in the cause, to warrant a suspicion that the sale was not fairly conducted, or that any person bid for the two lots set down to Elliot, more than the sum at which they were charged to him.

In making the sale in that mode, no deception was practised upon

the appellant; since he was informed, by Elliot's letter to him, of the 16th of March, 1816, that Mr. Boyd had further postponed the sale of Minifie's property, and would consider him, Greenleaf, as the purchaser for $3,500. The writer adds: "I have stipulated that the whole property shall be included. It is necessary to go through the forms prescribed by the decree;" meaning, no doubt, if the letter be truly transcribed into the record, the trust deed. But, on the 19th of March, 1817, when the contract was finally reduced to writing, the appellant was distinctly apprised that the whole of the lots had been sold at public sale, at six, twelve, and eighteen months; and he was then satisfied to give his note for the stipulated sum agreed to be paid for the nine lots, upon the engagement of Boyd to make a deed for the same to Samuel Elliot.

[* 146] Upon what plausible ground, then, can the appellant *now insist that the lots were not sold at public auction, and, on that ground, to seek to be relieved against the payment of his note, given for the purchase-money, thus agreed to be paid for the property? The argument urged by his counsel, that the contract is void, because the lots were sold to the appellant for a less sum than that at which they were struck off to the purchasers at the public sale, cannot for a moment be maintained; since, whatever might be the liability of the trustee to the *cestui que trust*, to pay the difference between those sums, it is surely not an objection, in the mouth of the appellant, sufficient to release him from his contract.

But, were it to be admitted that Boyd acted in derogation of his trust, in selling the property to the appellant for a less sum than he actually sold it for at public auction, and that on that account the title of the appellant might be impeached, may not the objection be removed by the agreement of the parties beneficially interested in the property under the deed of trust, to confirm the sale; or, by their acts, tending to produce the same result? Of this, we apprehend, there cannot exist a doubt. Now, who are the parties for whose benefit this trust was created? They are the creditors of Charles Minifie, in the first instance; and after they are satisfied, Mrs. Minifie, to the extent of the sum which might be decreed to her for alimony; and then Charles Minifie, as to any balance which might remain. But it appears from the exhibits filed in the cause, that the amount of the debt due by Minifie, and for which judgments were obtained against him, exceeded considerably the sum at which these lots sold at public auction, independent of the interest due upon those debts, and the costs of the different suits in which the judgments were entered. The only persons, then, who are beneficially interested in the property conveyed by the deed of trust, are the

creditors of Charles Minifie, who have united in a suit against the heir at law of Boyd, for the purpose of having a new trustee appointed to carry into execution the sale made of the property by the former trustee, under the deed of trust; and they are, as the bill charges, the active parties in enforcing the payment of the purchase-money. After these solemn acts, done in affirmance of the sale made to the plaintiff, the creditors would never be permitted, by a court of equity, to impeach it; nor can the alleged breach of trust be urged by the appellant, as a reason for annulling the contract or excusing him from the payment of the purchase-money.

The next objection made by the appellant's counsel to the decree of the court below is, that the title of the property which it directs to be conveyed to the appellant is defective, being incumbered with the claim of Francis Jameson to three of the [*147] lots, and with the right of dower of Mrs. Minifie in the whole of the property.

It is very manifest that the title of Jameson, if any he has, is merely nominal. The sale to him was made in 1816, upon six, twelve, and eighteen months' credit; and, by the terms of the sale, he was required to give his note for the purchase-money, with an approved indorser, negotiable at one of the banks in this district. The bill does not charge, nor is it even alleged at the bar, that a note was given by Jameson for the purchase-money bid for these lots; not one cent of it has been paid by him or even demanded; or that, from the year 1816, when the sale was made, to the present moment, a claim to the property has been asserted or intimated by this person. But it does appear, by the testimony of a witness examined in the cause, that the plaintiff, Greenleaf, has been in possession of the whole of the property from the time that he purchased it; and that Jameson had, upon the application of Boyd to relinquish his claim to the property, consented to do so.

Upon this state of facts, this court can feel no hesitation in saying that Jameson had not such an equitable title to the lots purchased by him as a court of equity would enforce against the trustee of Minifie or against the plaintiff. Whether that court would require a title like this to be released, in a case where a trustee was a party plaintiff asking for a specific execution of the contract, need not be decided in this case. But we are clearly of opinion that the want of such a release cannot be urged by the vendee, as a cause for rescinding the contract.

The objection founded on the right of dower of Mrs. Minifie, is quite as untenable as the one that has just been disposed of. The plaintiff, when he made the purchase of this property, was apprised

that he was dealing with a trustee; and knew or might have known, from the land records of the county in which the property was situated, whether Mrs. Minifie was a party to the deed of trust, and had or had not relinquished her right of dower. He required of the trustee no stipulation in relation to this right; and it may, therefore, be fairly presumed that the value of it was taken into consideration, in fixing the amount of the purchase-money to be paid for the property. In such a case, as well as in that which we have just disposed of, a court of equity will not interpose to relieve the vendee, but will leave him to such legal remedy as he may be entitled to, in case his title should, at any future time, be disturbed by these claims.

The court is, upon the whole, of opinion, that the objections to the decree, which have been noticed, are insufficient to warrant a reversal of it. It is, however, exposed to other objections, [* 148] * which must produce this result, and which now remain to be examined.

The first is that Richard Wallack, the substituted trustee, who is required by the decree to perform a number of acts, in order to entitle him to levy and to collect the amount of the judgments for the purchase-money, and upon the performance of which the injunction is dissolved, was no party to the controversy in the court below. The suit, it is true, was revived against him in his character of administrator of Washington Boyd, and also against the heir at law of Boyd; to which mode of proceeding no objection could be taken, if the decree had been against him in his character of administrator; because in that character he claimed under a title derived from the party by whose death the abatement of the suit was caused, and was the person designated by law to represent him, in relation to his personal estates.

But this was not the case in respect to Richard Wallack, as the substituted trustee and successor of Boyd. The power with which the latter was clothed became vested in Wallack, not by operation of law, but by the appointment of the court, subsequent to the institution of the suit. The original suit, which abated by the death of Boyd, became also defective by the termination of his powers and the appointment of a new trustee, and could only be prosecuted against him by way of a supplemental bill, in nature of a bill of revivor; in which it would be necessary to state not only the original bill, and the proceedings thereon, and the death of the former trustee, but the appointment of Wallack as his successor, and his acceptance of the trust, and to require him to appear and answer the charges contained in the supplemental and original bills. For any

thing appearing upon the face of this record, Wallack is an entire stranger to the trust with which the decree connects him, and without any power whatever to make a valid conveyance. For there being no supplemental bill, or allegation in any bill that Wallack had been appointed to complete the trust which Boyd had left unexecuted, and to collect the purchase-money for the property which that trustee had sold, and that he had accepted such appointment; these facts cannot be considered as having been established by the proceedings and decree in the suit of the creditors of Minifie, against the heir at law of Boyd. See Mitf. 33, 63, 70.

The next objection to the decree is that, after decreeing Wallack to perform a number of acts, to entitle him to levy and collect the amount of the judgment against the appellant, as before mentioned, it proceeds to dismiss the bill with costs; thereby putting the cause out of court, and rendering the other parts of the decree ineffectual. Should Wallack, for example, *refuse to execute a conveyance of the property to the plaintiff in the court below, pursuant to the decree, the non-existence of the suit on which that decree was made would prevent any process of contempt from issuing against him, for the purpose of compelling him to execute the decree. It is no answer to this objection that it appears by the record in this case that Wallack has in fact executed the decree on his part; since the error complained of is in the decree itself, and not in its execution. [*149]

It was insisted by the counsel for the appellees, in anticipation of the above objection, that the court below would have been warranted in dismissing the bill absolutely, without requiring any thing to be performed by the new trustee, in consequence of the omission of the plaintiff in that suit to make proper parties.

That a bill may be dismissed where the plaintiff, when called upon to make proper parties, refuses or is guilty of unreasonable delay in doing so, need not be questioned; but to do so without a demurrer, plea, or answer, pointing out the person or persons who the defendants insist ought to be made parties, is unprecedented, and would most unquestionably be erroneous, although the decree should assign this as the ground of dismission, which is not done in the present case.

The last objection to the decree which it is thought necessary to notice, is, that the heir at law of Washington Boyd, deceased, is not required to release her title to the property in controversy to the appellant; a majority of this court being of opinion that the legal estate in that property did not pass to Richard Wallack, under the decree of the 21st of January, 1823, before referred to, but is yet outstanding in the heir at law of Boyd.

The decree of the court below must, for these errors, be reversed, and the cause is to be remanded to that court, for further proceedings to be had thereon, in conformity with the principles before stated.

BENJAMIN BUCK and THOMAS HEDRICK *v.* THE CHESAPEAKE INSURANCE COMPANY.

1 P. 151.

The court is not bound to modify the instructions prayed for by counsel; if not correct in point of law as prayed, they may rightfully be rejected.

If the insurer make no inquiry as to the neutrality of the interest, an insurance "for whom it concerns" covers belligerent property.

Insurers are presumed to know the state and incidents of the trade in which property covered by them is represented to be embarked, and this may include a practice for neutrals to cover belligerent property.

But if an express representation is made that the property is neutral, a policy "for whom it concerns" does not cover property of a belligerent.

A master, being the legal owner of the whole cargo and the equitable owner of part of it, has an insurable interest in the whole.

Certain statements held not to amount to a representation of neutrality of property.

THE case is stated in the opinion of the court.

Hoffman and *Mayer*, for the plaintiffs.

Wirt (attorney-general) and *Meredith*, contrà.

[*158] *JOHNSON, J., delivered the opinion of the court.

This cause comes up from the circuit court for the Maryland district, on a difference of opinion.

The suit below was instituted on two policies of insurance; the one for $6,000, the other for $2,000, upon the brig Columbia, Daniel Fitch master, at and from the Spanish island of Porto Rico to Baltimore, for whom it may concern. Buck and Hedrick were the agents of Fitch, and the policies were made in their name. The first policy was executed on the 6th of May, 1822, and stands unimpeached by any circumstances occurring at the time of its execution. But, when application was made for the second policy, which was on the 24th of May, the agents laid before the underwriters a letter, dated Ponce, April 27, 1822, to this effect: —

"MESSRS. BUCK AND HEDRICK:

"I wrote you a few days ago, by the brig Ospray, Captain Perkins, direct for Baltimore, requesting you to have insurance done for me on the brig Columbia and her cargo, owned and commanded by me, to sail from this for Baltimore, about 5th to 10th of May, with

a cargo of sugar. When I wrote you by The Ospray, I could not say what amount of cargo to have insured for me. I now think I shall have on board about 130,000 pounds, valued at $8,000, which amount I wish you to have insured for me," &c.

The rest has no material bearing upon the cause. On the back of this letter was written the following inquiry: —

* " What will $2,000 be insured at, agreeable to within [* 159] letter, on cargo of which you have $6,000 insured some time since? BUCK AND HEDRICK."

The vessel and cargo were totally lost by the perils of the sea; and the interest proved at the trial consisted of above $2,000, the property of Fitch, and above $6,000, the property of G. Medina, a Spanish subject of Porto Rico, at that time affected with the character of a belligerent.

The whole cargo was consigned to Daniel Fitch, and documented as his; Medina himself being on board on the voyage.

The order for insurance, on which the policy of 6th May was effected, was in the following words: " Insurance is wanted against all risks, for account of whom it may concern, $3,000 on the brig Columbia, Daniel Fitch master, and on cargo $6,000, as interest may appear, at and from Ponce, Porto Rico, to Baltimore. A letter from Captain Fitch, dated 19th April, says, he expects to sail about 5th to 10th May; that the brig is in good order, perfectly tight and seaworthy. What premium?"

Both policies, it appears, were done at a premium of 1¼, and on neither occasion was the letter of the 19th April called for by the office, nor was any warranty or representation of any kind made or asked for respecting the cargo, beyond what was voluntarily made and has been stated.

The first instruction, on which the court below divided, was prayed for by the plaintiffs in these words: —

" That, as the policies of insurance in this case purport to insure the plaintiffs 'for whom it might concern,' they are not bound to prove that, at the time of effecting the insurance or any other time, they disclosed to the defendants that Spanish property was intended to be covered by the insurance; and that, in policies of such description, there can be no undue concealment as to the parties interested in the property to be insured."

Dangerous as it always is in a court of justice to generalize in the propositions which it decides, it is peculiarly so in questions arising on policies of insurance.

The present proposition is obviously couched in terms too general to admit of an answer in the affirmative, without restriction or modification. And as courts of justice are not bound to modify or fashion the instructions moved for by counsel, so as to bring them within the rules of law, if this cause had come up on a writ of error to the judgment of the court below, for refusing the instruction as prayed, it would be difficult to say that, in the terms in which it is presented, the court was bound to give this instruction.

To affirm "That, in policies of such description, there can be no undue concealment as to the parties interested in the prop-
[* 160] erty * to be insured," is obviously going much too far; since the underwriter has an unquestionable right to be informed, if he makes inquiry. The assured may be silent, it is true, if he will, and let the premium be charged accordingly; but if the inquiry then made should be responded to with information contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy, which may differ materially from the known and received signification in ordinary cases. He, for instance, who should insure "for whom it may concern," under an express assurance that there is no belligerent interest in the cargo, could not, upon any principle, be held to have made assurance upon belligerent interest.

This is no more than the application of the general principle, that insurance is a contract of good faith, and is void whenever imposition is practised.

That a policy "for whom it may concern" will, in ordinary cases, cover belligerent property, has been fully conceded in argument. Nor is it contested that previous representation will be sunk or absorbed, or put out of the contract, where the policy is executed in obvious inconsistency with those representations. But the ground here insisted on for defendants is, that the letter of April 27 was a representation that the whole cargo was Captain Fitch's, and that it thereby operated as an imposition upon the underwriters, and, as such, avoids both policies; or that it affixes a conventional meaning to the phrase in these policies, which limits its ordinary import.

Is there any thing in the case sufficient to except these policies from the ordinary import and effect of the phrase "for whom it may concern?"

We are of opinion there is not.

Whatever turn of expression may be given to the question, or in whatever aspect it may be presented, it is obviously, at last, no more than the simple question, have these underwriters been entrapped, or imposed upon, or seduced into a contract, of the force, extent, or

incidents of which a competent understanding cannot be imputed to them?

A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce, of the course and incidents of the trade on which they insure, and the established import of the terms used in their contract, must necessarily be imputed to underwriters. According to a distinguished English jurist, Lord Mansfield, in Pelly *v.* The Royal Exchange, &c., 1 Bur. 341, "The insurer, at the time of underwriting, has under his consideration the nature of the voyage and the usual manner of conducting it?" And what is usually done by such a ship, with such a cargo, in such a voyage, is * understood to be referred to by every policy. [* 161] Hence when a neutral, carrying on a trade from a belligerent to a neutral country, asks for insurance "for whom it may concern," it is an awakening circumstance. No underwriter can be ignorant of the practice of neutrals to cover belligerent property under neutral names, or of the precautions ordinarily resorted to that the cover may escape detection. The cloak must be thrown over the whole transaction, and in no part is it more necessary than in the correspondence by other vessels, so often overhauled by an enemy, for the very purpose of detecting covers on other cargoes. Letters thus intercepted have often been the groundwork of condemnation in admiralty courts; and underwriters, to whom the extension of trade is always beneficial, must and do connive at the practice in silence. They ask no questions, propose their premiums, and the contract is as well understood as the most thorough explanation can make it.

There is nothing in the letter in evidence calculated to mislead an insurer of ordinary vigilance, but what was fully explained away by concomitant circumstances. It is true, that in the letter Fitch writes, to have insurance done for him, on "the brig Columbia and her cargo," that he cannot say what amount of cargo to have insured for him. Yet, when the offer was submitted, it was indorsed on the back of this letter, and expressly declared to be upon the same cargo, of "which you have $6,000 insured, some time since."

The insurance alluded to was made "for whom it may concern," and this second policy is expressed in the same terms.

Here, then, was a neutral, professing himself to be owner of a cargo, consisting of produce of the hostile island, on a voyage having for its object to find a market for that produce — most unnecessarily, if himself the real owner, or if there were no owners but neutrals — most unwisely subjecting himself or them, to an increase of premium, which could not but result from such an offer.

This was a circumstance calculated to induce inquiry. The defendants had a right to make what inquiries they pleased as to the real character of the cargo; and if they did not make those inquiries, the law imputes to them the use of the phrase, "for whom it may concern," in its ordinary effect and signification. We are, therefore, of opinion that this instruction, if so modified as to be confined to the case before the court, ought to have been given.

The second prayer, amounting only to an affirmance of the general proposition, as relates to the policy of the 6th May, we are of opinion ought to have been given.

The third prayer, having the same bearing upon the pol-
[*162] icy *of the 24th May, we are of opinion, for the reasons expressed in the first prayer, ought also to have been given.

By the fifth prayer, the plaintiffs ask of the court to instruct the jury, "That if the said Daniel Fitch, at the time of said policies, was legal and equitable owner of part of the cargo insured; and the legal, though not equitable owner of the residue, policies 'for whom it may concern' do cover the entire cargo; and said Fitch is competent in law to recover the whole, in his own name, though the belligerent character of a part of said cargo was not disclosed at the time of effecting said policies."

The language in which this prayer is couched, obviously imports two propositions: 1. That a policy "for whom it may concern" will cover the whole cargo, though the assured had only the legal, without the equitable interest in part, and a legal and equitable interest in the residue; and, 2. That Daniel Fitch is competent in law to recover the whole, in his own name, though the belligerent character of part was not disclosed when the policies were executed.

It is a very great objection to this prayer, that the language used is too general and abstracted, and not adapted to the case with that studied precision which the law requires, thereby rendering it scarcely possible for the court to meet it with a simple, positive, or affirmative answer.

To the first of the two propositions it may be further objected that it is difficult to perceive how it came to be introduced into the cause. Abstracted from the effect of belligerent interest in the cargo, the defence admits that the policy covers all other interests, whether legal or equitable.

And, with regard to the second, it is not easy to perceive why the court should be called upon to charge the jury that Daniel Fitch was competent in law to recover the whole in his own name, when the suit is in fact prosecuted in the name of the agents; and they count upon the interests of both Medina and Fitch.

But the cause has been argued upon the assumption that this prayer brings up the question of insurable interest in Fitch, by whose instructions Buck and Hedrick effected this insurance; and, as it is better to follow out the concessions of counsel than to let the cause come up here again upon this point, we will consider that question as being raised by this, in connection with the other prayers.

And here, we think, the facts make up a clear case of insurable interest. The only doubt, probably, arises from one of the most prolific grounds of uncertainty on many subjects, namely: The use of terms originally unaptly selected, but now rendered legitimate by use. It is only necessary to inspect a few cases on this doctrine, to be satisfied that the term interest, as used in [*163] application to the right to insure, does not necessarily imply property in the subject of insurance.

In the case of Craufurd *et al. v.* Hunter, 8 D. & E. 13, the plaintiffs were commissioners appointed by the crown, under an act of parliament, to superintend the transportation, &c., of Dutch vessels, seized in time of peace, without any present designation for whom — whether to be held in trust for the original owners, the crown, or the captor. The vessel had been carried into St. Helena; and the policy was effected with a view to her safe transportation from that island to England; and, after much consideration, it was adjudged that this was a good insurable interest, and the plaintiffs recovered.

The same point was afterwards decided in Lucena *v.* Craufurd *et al.* 3 Bos. & Pul. 75, on a writ of error to the exchequer, after three arguments, and great deliberation, yet the seizures were made before declaration of war; and the interest of the plaintiffs amounted to nothing but a power over the subject, with a claim by *quantum meruit*, for their services.

Putting down the present case, therefore, to its lowest grade of insurable interest, it is equal to that of the plaintiffs in the two cases alluded to; for Daniel Fitch was, at least, the agent or trustee of Medina, to transport his goods from Porto Rico to a market, and to secure them from the chances of capture and loss.

But this case is stronger than the English cases cited; for, by the act of Medina himself, Fitch was exhibited to the world, clothed with all the national documents which evidence an absolute property; and for many purposes, the real owner would have been estopped to deny it.

We will instance the payment of duties; for which, either as owner or consignee, our laws held Fitch absolutely liable. We

have, therefore, no doubt of the sufficiency of the insurable interest in this case.

The last prayer, on which the court below divided, is in these terms: —

"That the court instruct the jury that the letter of the 27th April, 1822, with the order written thereon, do not, in law, amount to a representation that the property to be insured was the sole property of Daniel Fitch; or that the whole, or any part thereof, was not belligerent."

We have already expressed our opinion on the proposition here presented. It is to be regretted that this prayer, also, is so defective in precision. But it was obviously intended, and so argued, to be confined to a representation which would vitiate the policy. With relation to the first policy, we are all of opinion that it was [*164] unaffected by the letter specified; and, *with regard to the second policy, whatever might have been the effect of this letter, had it stood alone, yet, taken in connection with the concomitant circumstances, it was not fatal to the contract.

On this point, a majority of the court would be understood to express the opinion that this letter, connected with the order indorsed upon it, the previous insurance referred to, and considered in relation to the state of the world, and the nature, character, and ordinary conduct of the voyage insured, was not such a representation, as, *per se*, vitiated the policy.

And this opinion will be certified to the court below.

This cause came on, &c.; on consideration whereof, this court is of opinion: 1. That as the policies of insurance in this cause purport to insure the plaintiffs "for whom it may concern," they are not bound to prove that, at the time of effecting the said insurance, or any other time, they disclosed to the defendant that Spanish property was intended to be covered by the said insurance, unless inquiries on the subject were propounded by the insurer, prior to the insurance. 2. That if the jury believe the policy of the 6th of May, 1822, was founded on the order of the same date, the said policy being "for whom it may concern," does cover belligerent as well as neutral interest. 3. That if the jury believe that the policy dated 24th of May, 1822, was founded on the letter of the 27th of April, 1822, and the order written thereon, the policy being "for whom it may concern," does cover neutral as well as belligerent property. 4. That if the said Daniel Fitch, at the time of the date of the said policies, was legal and equitable owner of part of the cargo insured, and legal though not equitable owner of the residue, the policies being "for whom it may concern," do cover the entire cargo; and that the said Fitch

had a good insurable interest in the whole cargo; and the plaintiffs, as his agents, are competent to recover the whole sum insured thereon, on proof of such legal and equitable interest in the said Fitch. 5. That the letter of the 27th of April, 1824, whatever might be its effect if taken alone, yet, taken in connection with the indorsement thereon, with the previous policy to which it refers, the actual state of the world, &c., and the nature of such transactions, is not such a representation as vitiates the policy. All which is ordered and adjudged by this court to be certified to the said circuit court.

8 H. 234.

HENRY WRIGHT, WILLIAM CAROTHERS, ROBERT DENNISTON, WILLIAM PATTON, THOMAS BURMAN, and JAMES ROBERTSON, Plaintiffs in Error, *v.* The Lessee of LEVI HOLLINGSWORTH and JOHN KAIGHN, Defendants in Error.

1 P. 165.

An allegation that the lessor of the plaintiff is a citizen of the State of Missouri is sufficient, without an averment that Missouri is one of the United States.

This court will not review the decision of a circuit court allowing a new count to be filed, in an action of ejectment, alleging a demise by a lessor not named in the old counts, nor its refusal to allow costs on the leave to amend.

When a new count is filed, the defendant has a right to plead *de novo*; but if he goes to trial on the old plea, which puts the whole declaration in issue, there is no error.

THE case is stated in the opinion of the court.

White, for the plaintiff.

Isaacs, contrà.

* TRIMBLE, J., delivered the opinion of the court. [* 167]

This action of ejectment was commenced in the circuit court held in East Tennessee, by suing out a writ of *capias ad respondendum*, accompanied with the declaration, and the tenants in possession held to bail to answer to the action, in the manner provided for by a statute of the State. The original declaration contained two counts: the first, on the demise of Hollingsworth and Kaighn, citizens of Pennsylvania; the second, on the demise of Joseph Blake and Daniel Green, citizens of Massachusetts.

The tenants appeared and pleaded not guilty, upon which issue was joined. A trial was had, and a nonsuit suffered by the plaintiff, which was set aside on the payment of costs. After these proceedings, the court, on the motion of the plaintiff, permitted the

declaration to be amended, by adding a count on the demise of Benjamin Spencer, a citizen of Missouri. The parties went to trial without any other pleadings; and, a verdict having been found for the plaintiff, upon the third or new count, judgment was thereon rendered in his favor, to reverse which the defendants have prosecuted this writ of error.

They allege the judgment is erroneous and should be reversed —

[*168] *1. Because the count on which judgment was rendered against them does not show that Missouri is one of the United States.

2. Because the court permitted the declaration to be amended by adding a new count, on the demise of Benjamin Spencer, and especially as the amendment was permitted without payment of costs.

3. Because no plea was filed to the new count, nor any issue made up thereon.

The first objection was very properly not pressed in argument. The count alleges Benjamin Spencer to be a citizen of the State of Missouri. This count was filed after Missouri was admitted as a State into the Union; and there can be no question but that this and every other court in the nation are bound to take notice of the admission of a State as one of the United States, without any express averment of the fact.

In support of the second objection, it is urged that the admission of the new count, on the demise of a new lessor, made a material alteration in the suit; that, the suit having been originally commenced under the state practice, by writ of *capias ad respondendum*, to which the former lessors only were parties, the amendment was, in substance and effect, the institution of a new suit, or at least grafting a new one upon the old, and produced an incongruity upon the record; the first and second counts and the proceedings on them, being proceedings under the statute, and the third or new count a proceeding at common law; and that, according to established principles of practice, it should have been allowed, if at all, only on payment of costs.

This argument would be entitled to great and perhaps decisive influence, if addressed to a court having any discretion or power over the subject of amendments.

But the allowance and refusal of amendments in the pleadings, the granting or refusing new trials, and, indeed, most other incidental orders made in the progress of a cause before trial, are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction, as to be fit for their decision only, under their own rules

and modes of practice. This, it is true, may occasionally lead to particular hardships; but, on the other hand, the general inconvenience of this court attempting to revise and correct all the intermediate proceedings in suits, between their commencement and final judgment, would be intolerable. This court has always declined interfering in such cases; accordingly it was held by the court, in Wood *v.* Young, 4 C. 237, that the refusal of the court below to continue a cause after it is at issue, is not a matter upon which error can be assigned; that the refusal of *the court below [*169] to grant a new trial is not matter for which a writ of error lies (5 C. 11, 187, and 4 W. 220); and that the refusal of the court below to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as a cause of reversal or a writ of error. We can perceive no distinction in principle between these cases and the one before the court. We must take the declaration, including the amendment, as we find it on the record. Nor can we interfere because the court below did not, as it ought, require the costs formerly accrued to be paid as a condition of the amendment.

The authorities cited by the learned counsel do not, we think, support his last position, that the judgment is erroneous because a plea was not filed to the new count. They prove, unquestionably, that, upon the amendment being made to the declaration by adding a count, the defendants had a right to plead *de novo;* they prove nothing more. They do not show that the defendants in such cases must necessarily plead *de novo*, or that judgment may be entered by default for want of a plea to the new count, if, before the amendment, he has pleaded the general issue. We think the practice is well settled to the contrary. The defendant has a right, if he will, to withdraw his former plea, and plead anew either the general issue or any further or other pleas which his case may require; but he may, if he will, abide by his plea already pleaded, and waive his right of pleading *de novo.* His failure to plead, and going to trial without objection, are held to be a waiver of his right to plead, and an election to abide by his plea; and if it, in terms, purports to go to the whole action, as is the case in this instance, it is deemed sufficient to cover the whole declaration, and puts the plaintiff to the proof of his case on the new, as well as on the old counts.

This is the general doctrine in other forms of action, such as trespass and assumpsit; and we see no reason to distinguish the action of ejectment, or take it out of the general rule.

Judgment affirmed, with costs.

14 P. 614; 7 H. 706.

JAMES J. M'LANAHAN, WILHELMUS BOGART, and JOHN JOSEPH COIRON, Plaintiffs in Error, *v.* THE UNIVERSAL INSURANCE COMPANY Defendants in Error.

1 P. 170.

On a motion for a new trial, if, upon the whole case, justice has been done, and the verdict is substantially right, no new trial is granted, though some mistakes may have been made.

Aliter on a writ of error, for then the judgment must be reversed if any erroneous ruling appears by the record to have entered into it.

Seaworthiness for lying in port may be quite a different thing from seaworthiness for a voyage.

Seaworthiness and deviation are mixed questions of fact and law, and the aid of a jury is generally necessary to their decision.

If a party who has ordered insurance has information of a loss, he is bound to use due and reasonable diligence to make it known to his agent, and to countermand his order. What is such diligence depends on the circumstances of each case, and is principally matter of fact for a jury.

The question of materiality of the time of sailing, to the risk, is a question of fact for the jury. So are the questions, whether an omission to state the time was fraudulent, and whether it misled the underwriter.

THE case is stated in the opinion of the court. The record detailed all the evidence offered by the plaintiff in the court below, and which that court ruled was insufficient to enable the plaintiff to recover. As the opinion of this court proceeded on the ground that this evidence ought to have been submitted to the jury, and gives a statement of the nature and tendency of the evidence, it is not deemed necessary to set it out at large in the report.

Taney and *Meredith*, for the plaintiffs.

Wirt (attorney-general) and *Ogden*, contrà.

[*181] *STORY, J., delivered the opinion of the court.

This is a writ of error to the circuit court of the district of Maryland. The original action was brought by the plaintiffs in error against the defendants, upon a policy of insurance [*182] underwritten *by the defendants, whereby "they caused Thomas Tenant, for whom it may concern, to be insured, lost or not lost, at and from Havre de Grace to New Orleans, with liberty to touch and trade at Havana," $10,000 upon brig Creole and appurtenances. The declaration averred the interest in the plaintiffs, and a total loss by the perils of the seas. The defendants pleaded the general issue; and upon the trial, after the whole evidence on both sides had been given in, the court, upon the prayer of the defendants' counsel, instructed the jury "that, upon the whole evidence in the case" as stated, the plaintiffs are not entitled to recover, and

the verdict of the jury ought to be for the defendants." Nine different instructions were then prayed for on behalf of the plaintiffs, which were all refused by the court, upon the ground that the opinion already given disposed of the whole cause upon its merits. If that opinion was correct, this refusal was entirely justifiable, for the court was under no obligation to discuss or decide other points when the plaintiffs' case was already shown to possess a fatal defect.

The general question, then, before this court, is upon the propriety of the instruction so given to the jury.

A suggestion has been thrown out at the bar that this instruction was not intended to be positive and absolute, but merely advisory to the jury; that it was not meant to take away the right of the jury to decide freely on the facts, but merely to offer for their consideration those views which the court had arrived at, and which it might at all times properly suggest to the jury. It is doubtless within the province of a court, in the exercise of its discretion, to sum up the facts in the case to the jury, and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury. But care should be taken in all such cases to separate the law from the facts, and to leave the latter, in unequivocal terms, to the jury, as their true and peculiar province. We do not, however, understand that the present instruction was in fact, or was intended to be, merely in the nature of advice to the jury. It is couched in the most absolute terms, and imposed an obligation upon the jury to find a verdict for the defendants. It assumed there were no disputable facts or inferences proper for the consideration of the jury upon the merits, and that, upon the unquestioned facts, the plaintiffs had no legal right of recovery. It is in this view that it is open for the consideration of this court, and in this view it will now be discussed, as it was discussed in the argument at the bar.

Four grounds have been presented to justify the opinion of the circuit court, which, it is said, are apparent from the record itself, and each of them is decisive upon the case. The first is
* the unseaworthiness of the ship at the time when she [* 183]
broke ground at Havre, and commenced the homeward voyage, by reason of the master and a sufficient crew not being then on board. The second is the laying off and on near the port of Havre, after departure on the voyage, for several hours, waiting for the master to come on board, which, it is said, was an improper detention, and amounted to a deviation. The third is the omission of Coiron to communicate to his agent or other persons in America the knowledge of the loss, by the way of Havana, so as to countermand the order of insurance, which it contended was a fatal omission of duty.

The fourth is the omission to mention the time of the vessel's sailing from Havre, in the letter of the 20th October, ordering the insurance, which, whether fraudulent or not, was a material concealment, and misled the underwriters in the same manner as if there had been a representation that the time of the sailing was uncertain.

It is to be considered that these points do not come before this court upon a motion for a new trial after verdict, addressing itself to the sound discretion of the court. In such cases, the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it are adopted by the court itself. If, therefore, upon the whole case, justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial. The reason is that the application is not matter of absolute right in the party, but rests in the judgment of the court, and is to be granted only when it is in furtherance of substantial justice. The case is far different upon a writ of error, bringing the proceedings at the trial, by a bill of exceptions, to the cognizance of the appellate court. The directions of the court must then stand or fall, upon their own intrinsic propriety, as matters of law.

The first and second points appear to us, in the present case, to resolve themselves into matters of fact; and the facts are too imperfect and too general to enable the court to draw any legal conclusion from them, either as to seaworthiness or deviation. There is no doubt that every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew. But how is this court to arrive at the conclusion that the brig Creole was not in that predicament at the commencement of the present voyage? The argument assumes that the ship ought not to have got under weigh, or proceeded into the offing, until the master and all the crew necessary, not for that act, but for the entire voyage, were on board. If the law were so, we have no means of ascertaining what crew was actually [*184] *on board at the time; nor whether the voyage was absolutely intended to be commenced on that day; nor whether the departure was merely contingent and dependent upon the master's procuring the proper ship's papers, and the breaking ground, and standing off and on in the offing, were preparatory steps, only for this purpose; nor whether for such purposes the pilot and crew on board were not amply sufficient. But we are far from being satisfied that the law has interposed any such positive rule as the argument supposes. Seaworthiness in port, or for temporary purposes, such as mere change of position in harbor, or proceeding out of port, or lying

in the offing, may be one thing; and seaworthiness for a whole voyage, quite another. A policy on a ship, at and from a port, will attach, although the ship be at the time undergoing extensive repairs in port, so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy. What is a competent crew for the voyage; at what time such crew should be on board; what is proper pilot ground; what is the course and usage of trade in relation to the master and crew being on board, when the ship breaks ground for the voyage; are questions of fact, dependent upon nautical testimony; and are incapable of being solved by a court, without assuming to itself the province of a jury, and judicially relying on its own skill in maritime affairs. In this view of the point, it is not necessary to rely on the doctrine of Lord Chief Justice Abbott, in Weir *v.* Aberdeen, 2 Barn. & Ald. 320, which goes the length of asserting that, if there be unseaworthiness at the commencement of the voyage, and the defect is cured before loss, a subsequent loss is recoverable under the policy. This is an important doctrine, and well worthy of discussion, whenever it comes directly in judgment.

The like answer may be given to the point of deviation. This court cannot intend that here there was any unnecessary delay in the commencement or course of the voyage. The delay, for the want of papers, may have been entirely justifiable; and indeed may have conduced to an earlier inception of the voyage, by putting the ship in a situation to depart at a moment's warning. The usage of trade may be generally, or at least in that particular part, to get the ship under weigh, as in this case, and wait in the offing until the master is ready to come on board; and that usage may be not only convenient and beneficial to all parties, but absolutely necessary, in given cases, from the nature of the port, and the winds and seasons. How then can this court undertake to decide, as matter of law, apparent upon the record, that any delay admitting of such explanations amounts to a deviation?

The next point is the omission of Coiron to communicate
* information of the loss to his agent, so as to countermand [*185]
the order for insurance. The contract of insurance has been said to be a contract *uberrimæ fidei*, and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any facts material to the risk which he does not disclose; and that no known loss had occurred, which by reasonable diligence might have been communicated to him. If a party having secret information of a loss procures insurance without disclosing it, it is a manifest fraud, which avoids the policy.

If, knowing that his agent is about to procure insurance, he withholds the same information for the purpose of misleading the underwriter, it is no less a fraud; for under such circumstances the maxim applies, *qui facit per alium, facit per se.* His own knowledge, in such a case, infects the act of his agent, in the same manner and to the same extent which the knowledge of the agent himself would do. And even if there be no intentional fraud, still, the underwriter has a right to a disclosure of all material facts which it was in the power of the party to communicate by ordinary means; and the omission is fatal to the insurance. The true principle deducible from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent as soon as, with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence the information might have been communicated, so as to have countermanded the insurance, the policy is void. This doctrine is supported by the English as well as the American authorities, and particularly by Watson *v.* Delafield, 1 John. 152; 2 Caines, 224; 2 John. 526; where most of the early cases are collected and commented upon; and it is well summed up by Mr. Phillips, in his Treatise on Insurance, p. 96. We do not go over the cases at large, because there is no controversy as to the general result. The only matter for observation is, whether the rule as to diligence may not, in certain cases, be somewhat more strict, so as to require what, in Andrew *v.* Marine Insurance Company, 9 John. 32, is called "extreme diligence;" or what in Watson *v.* Delafield, is left open for discussion, as extreme diligence; the duty of communication, where the countermand may not only probably but possibly arrive in season. We think, however, that the principle of the rule requires only due and reasonable diligence, to be judged of under all the circum-
[*186] stances of *each particular case; and that the expressions thrown out in the cases above mentioned were not so much intended to point out a stricter rule as to intimate that there might be cases in which a very prompt effort for communication might be fairly deemed not due and reasonable diligence, as where the loss takes place very near the port at which the insurance is to be made, and the means of communication by mail or otherwise are regular or numerous; or where, from the lapse of time and the date of the order for insurance, the party cannot but feel that every moment's delay adds many chances in favor of the insurance being made before knowledge of the loss. Under such circumstances, in proportion

as the delay would properly give give rise to stronger suspicion of intentional concealment, the duty of prompt communication would naturally seem to press upon the party a more vigilant diligence. The case of Wake *v.* Atty, 4 Taunt. 494, lays down no new rule, but merely applies the old one to circumstances somewhat nice and peculiar in their presentation.

What constitutes due and reasonable diligence in cases of this nature is principally matter of fact for the consideration of a jury. When, indeed, all the facts are given and the inferences deducible therefrom, the question may resolve itself into a mere question of law. But it is, in general, impossible to lay down a fixed rule on the subject, from the almost infinite variety of circumstances which may affect its application; much must depend upon the means of communication, the situation of the parties, the knowledge of conveyances, the fair exercise of discretion as to time, mode, and place of conveyance, the course of trade, and nature of the voyage, and the probable chances of the countermand being effectual. All these are matters of fit inquiry before the jury, and must, from their very nature, apply with very different force to different cases.

To bring these remarks home to the present case, there are certainly circumstances which deserve the most careful consideration of a jury upon the point of due diligence. The loss occurred at no great distance from the port of Havana; and if letters had been sent ashore at that port there is strong reason to believe that they could have reached Mr. Stoney in time for a countermand, and at all events, if the loss had been made generally public at the Havana, the news might have reached Baltimore before the insurance. But the record does not contain facts enough to establish a want of reasonable diligence on the part of Mr. Coiron. It is nowhere stated that he was in a situation to make such a communication, or that he knew of the mate and crew being landed, or that vessels were about to depart for the United States from Havana. Nor is it shown what were the means and facilities of communication *in the [*187] course of trade and voyages between that port and the United States, regular or irregular, from which we might deduce his knowledge of these means and facilities. Nor is it shown that the parties contemplated a stoppage off the Havana so as to put him upon diligence in writing; nor that this mode of conveyance of news was more certain or quicker than others which might have been resorted to in the ordinary course of the voyage of the ship Trumbull to New Orleans. We may, indeed, conjecture how these matters were, by general surmise or personal information; but judicially we can know nothing beyond what the record presents of the facts; yet

all these circumstances must or may be material to the point of due diligence. In their very essence they are matters of fact and not conclusions of law.

The opinion, therefore, to which the learned counsel wished to conduct us, that the policy is void, because there has been gross negligence in not countermanding the order for insurance, is one to which upon this record we cannot judicially arrive. It would be assuming the rights and exercising the functions of the jury upon matters not proved, or wholly indeterminate in their own nature. This ground for maintaining the instruction of the circuit court must then be abandoned.

The next point is the omission in the letter of the 20th October of any mention of the time of the vessel's sailing. This is put to the court in a double aspect; first, as the concealment of a material fact, and secondly, connecting the language of the letter with the accompanying circumstances, as a virtual representation that the vessel was not then ready or about to sail on the voyage.

Whether this omission in the letter was merely accidental, or with design to mislead the underwriters; and whether, if so designed, it had the effect, (which upon the testimony in the case would be a matter of serious doubt,) it is not now necessary to inquire. If accidental it would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not in fact mislead; and whether fraudulent or not, was matter of fact for the jury. That there was no virtual representation as to the time of sailing, seems to us conclusively established by the language of the letter of Colonel Tenant, requesting insurance. He there says: "He (Coiron) writes from Havre, under date of the 20th October; but does not say when the brig would sail." Now this letter in direct terms negatives any intention to represent any particular time of sailing. It leaves the question freely open to the underwriters, either for further inquiry or for any presumptions most unfavorable to the assured. The natural result ought to be that the underwriters, should calculate
[* 188] the time of sailing as very *near the date of the letter, so *as to ask a premium equal to the widest range of risk from the intermediate lapse of time. The underwriters had no right to presume that the ship would sail at some future indefinite period and to bind the assured to that presumption. The letter told them in effect that the assured would bind themselves to no representation as to the time of sailing; but asked for insurance whenever the ship might sail, be it on that day or any future day. In this view the point as to representation vanishes; and the like consideration would in a great measure dispose of that of concealment.

But the question as to this latter point has been argued at the bar upon much more broad and comprehensive principles; upon which it seems proper for this court to express an opinion, especially as this case may again undergo the consideration of a jury.

It is admitted that a concealment to be fatal to the insurance must be of facts material to the risk; and certainly of this doctrine there cannot at this time be any legal doubt. It is further admitted (and so is the unequivocal language of the authorities) that generally the materiality of the concealment is a question of fact for the jury. But it is said that there are exceptions from the rule; and that concealment of the time of sailing belongs to the class of exceptions, and is a question of law for the exclusive decision of the court. It is necessary to maintain this position in its full extent, to extricate the present case from its pressing difficulties; and if this shall be successfully made out, it will still remain to be decided whether the facts stated in the record are sufficient to enable the court to pronounce the conclusion of law.

That the time of sailing is often very material to the risk cannot be denied; that it is always so is a proposition that will scarcely be asserted, and certainly has never yet been successfully maintained. How far it is so must essentially depend upon the nature and length of the voyage, the season of the year, the prevalence of the winds, the conformation of the coasts, the usages of trade as to navigation and touching and staying at port, the objects of the enterprise, and other circumstances, political and otherwise, which may retard or advance the general progress of the voyage. The material ingredients of all such inquiries are mixed up with nautical skill, information, and experience, and are to be ascertained in part upon the testimony of maritime persons, and are in no sense judicially cognizable as matter of law. The ultimate fact itself, which is the test of materiality, that is, whether the risk be increased so as to enhance the premium, is in many cases an inquiry dependent upon the judgment of underwriters and others who are conversant with the subject of insurance. In this very case *the introduction of [*189] testimony was indispensable to show the usual length of the voyage; and it was quite questionable whether in a just sense the vessel could be deemed a missing vessel at the time of the insurance. Upon such a point it would not be a matter of surprise if different underwriters should arrive at different results. In the nature of the inquiry, then, there is nothing to distinguish the time of sailing of the ship from any other fact, the representation of concealment of which is supposed to be material to the risk. It must still be resolved into the same element.

It has been said that there is no case in which the materiality of the time of sailing has been doubted where the ship was abroad at the time; whether this be so or not it is not important to ascertain, unless it could be universally affirmed, (which we think it cannot,) that the time of sailing abroad must always be material to the risk. If it may not always be material, the question whether it be so in the particular case is to be decided upon its own circumstances. Indeed, we cannot perceive how the place of sailing, whether from a home or foreign port, can make any difference in the principle. The time of sailing from a home port may be material to the risk, and if so the concealment of it will vitiate the policy; but whether material or not, opens the same inquisition into facts as governs in cases of foreign ports. There may be less intricacy in conducting it, or less difficulty in arriving at a proper conclusion, but it is essentially the same process. The case of Fort *v.* Lee, 3 Taunt. 381, did not proceed upon the ground that the time of sailing from a home port was never material to be communicated; but that, under the circumstances of that case, the underwriter, if he wished to know whether the ship had sailed, ought to have made inquiry. It was a mere application to the discretion of the court to grant a new trial where the plaintiff had obtained a verdict, and there was no pretence of any misdirection at the trial. In Foley *v.* Moline, 5 Taunt. 430, the court said that there was no pretence for the proposition, as a general rule, that it was necessary to communicate to the underwriters whether the vessels on which an insurance was proposed had sailed or not. There might be circumstances that would render that fact highly material, as if the ship were a missing ship or out of time. So that here, a denial of the proposition now asserted before us was in the most explicit terms avowed and acted on.

Two *nisi prius* cases before Lord Mansfield have been relied on to establish the supposed exception to the general rule of cases relative to the time of the sailing of the ship, in which it is argued that his lordship undertook to decide the point of materiality as
[* 190] matter of law, and to give it as a rule to the *jury. It is proper to remark that little stress ought to be laid upon general expressions of this sort, by judges, in the course of trials. Where the facts are not disputed the judge often suggests, in a strong and pointed manner, his opinion as to the materiality of the concealment, and his leading opinion of the conclusion to which facts ought to conduct the jury. This ought not to be deemed an intentional withdrawal of the facts or the inferences deducible therefrom from the cognizance of the jury; but rather as an expression of opinion, addressed to the discretion of counsel, whether it would be worth

while to proceed further in the cause. And the like expression in summing up any cause to the jury must be understood by them merely as a strong exposition of the facts, not designed to overrule their verdict, but to assist them in forming it. And there is the less objection to this course in the English practice; because, if the summing up has had an undue influence, the mistake is put right by a new trial upon an application to the discretion of the whole court. This is so familiarly known that it needs only to be stated to be at once admitted. It is with reference to these considerations that the cases above alluded to should be examined.

The first is Ratcliff *v.* Shoobred, cited from Marshall on Insurance, p. 290. It would certainly seem, at the first view, that Lord Mansfield did decide that concealment was material. But even by Mr. Marshall's report, brief as it is, it by no means appears that the materiality was in question at the trial, but only the effect of the concealment in avoiding the policy. The same case is reported more fully and more accurately by Mr. Park on Insurance, p. 290, where it is perfectly clear that the point of materiality was left to the jury. "The question is," said his lordship, "whether this be one of those cases which is affected by misrepresentation or concealment. If the plaintiffs concealed any material part of the information they received, it is a fraud, and the insurers are not liable;" and the jury found a verdict for the defendant under this direction. So that the point was left fully open to them.

The next case is Fillis *v.* Berton, cited in Marshall on Insurance, 465, and reported also in Park on Insurance, 292. The insurance was on a ship from Plymouth to Bristol; and it appeared that the broker's instructions stated that the ship was ready to sail on the 24th of December, when in fact she had sailed on the 23d. Mr. Marshall states that Lord Mansfield ruled that this was a material concealment and misrepresentation; but Mr. Park, from whose work the report is professedly taken, uses no such expression. His words are, Lord Mansfield said this was a material concealment and misrepresentation; and the jury hesitating, he proceeded to expound to *them the general principles of law on the subject of misrepresentation and concealment; and he seems to have taken it for granted that the misrepresentation was material, (as from the short duration of such a voyage might naturally be inferred,) and that the only point was whether the ship had sailed or not. The same explanation disposes of the case of M'Andrews *v.* Bell, 1 Esp. 373. Indeed, in any other view it would be impossible to reconcile these decisions with the judgment pronounced by Lord Mansfield and other judges, upon more mature deliberation, when

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causes have been brought before them in bank. Take for instance what fell from the court upon the motion for a new trial, in M'Dowall *v.* Fraser, Doug. 247, 260; Shirley *v.* Wilkinson, Doug. 306, n.[1]; Hodgson *v.* Richardson, 1 Bl. 463; Littledale *v.* Dixon, 4 Bos. & Pul. 151, and Hull *v.* Cooper, 14 East, 479. In the case of the Maryland Insurance Company *v.* Ruden's Administrators, 6 C. 338, this court expressed the opinion that, "it was well established that the operation of any concealment on the policy depends on its materiality to the risk, and that this materiality is a subject for the consideration of a jury." That opinion was acted upon by the court of errors of New York, in the case of the New York Fireman Insurance Company *v.* Walden, 12 John. 513, where Mr. Chancellor Kent in a very elaborate judgment reviewed the authorities, and laid down the doctrine in a manner that merits our entire approbation.

We think, then, that the exception insisted upon at the bar cannot, upon principle or authority, be supported; and that the question of materiality of the time of the sailing of the ship to the risk, is a question for the jury, under the direction of the court, as in other cases. The court may aid the judgment of the jury, by an exposition of the nature, bearing, and pressure of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon a contested matter of fact, resolving itself into a mere point of law. If, indeed, the rule were otherwise, the facts in the record are not so full as to enable the court to reach the desired conclusion. There is not sufficient matter upon which we could positively say that the time of sailing was, in this case, necessarily material to the risk.

For these reasons, the judgment of the circuit court must be reversed, and the cause remanded, with directions to award a *venire facias de novo.*

This cause came on, &c.; on consideration whereof it is considered by this court, that there is error in the opinion of the circuit [*192] court, given to the jury upon the prayer of the *defendant's counsel; — that upon the whole evidence in the case, as stated in the record, the plaintiffs are not entitled to recover, and that the verdict of the jury ought to be for the defendant, that opinion having withdrawn from the proper consideration of the jury matters of fact in controversy between the parties.

It is therefore further considered and adjudged, that the judgment of the said circuit court in this case be and the same is hereby reversed; and that the cause be remanded to the said circuit court, with directions to award a *venire facias de novo.*

8 H. 234; 13 H. 115.

[1] S. C. in full, 3 Doug. 41.

CORNELIUS COMEGYS and ANDREW PETTIT, Plaintiffs in Error, *v.* AMBROSE VASSE, Defendant in Error.

1 P. 193.

Under the treaty with Spain, of February 22, 1819, (8 Stats. at Large, 252,) the commissioners had power to decide conclusively upon the amount and validity of claims, but not upon the conflicting rights of parties to the sums awarded by them.

The right to indemnity for an unjust capture passes to the underwriter by an abandonment, and to the assignee, on the bankruptcy of the underwriter, under the bankrupt act of April 4, 1800, (2 Stats. at Large, 19.)

THE case is stated in the opinion of the court.

J. R. Ingersoll and *D. B. Ogden*, for the plaintiffs.

Lee and *C. J. Ingersoll*, contrà.

* STORY, J., delivered the opinion of the court. [* 210]

This was an action of *assumpsit*, brought by Ambrose Vasse, in the circuit court for the district of Pennsylvania, to recover from the plaintiffs in error, (who were defendants in the court below,) a certain sum of money, received by them under the following circumstances: —

Previous to the year 1802, Vasse was an underwriter on various vessels and cargoes, the property of citizens of the United States, which were captured and carried into the ports of Spain and her dependencies, and abandonments were made thereof to Vasse, by the owners, and he paid the losses arising therefrom, prior to the year 1802. Vasse became embarrassed in his affairs, and his creditors proceeded against him as a bankrupt under the act of congress of 4th April, 1800, c. 19. An assignment was made accordingly to Jacob Shoemaker, (who is deceased,) and the defendants, Comegys and Pettit, who proceeded to take upon themselves the duties of assignees, and have ever since continued to perform the same. Vasse was discharged, under the commission, and his certificate of discharge bears date the 28th May, 1802. In the year 1824, the sum of $8,846.14 was received by the defendants, from the treasury of the United States, being the sum awarded by the commissioners sitting at Washington, * under the treaty with Spain [* 211] which ceded Florida to the United States, dated 22d of February, 1819, on account of the captures and losses aforesaid. On the 9th of December, 1823, Vasse filed a bill in equity in the circuit court of the District of Columbia, which is in the case, upon which it seems no final proceedings were had on the merits. Under the

commission of bankruptcy, Vasse made a return of his effects to the commissioners, which is in the case.

Upon these facts, a general verdict was found for the plaintiff, Vasse, for the sum of $8,846.14, subject to the opinion of the court, with liberty for either party to turn the same into a special verdict; and the circuit court gave judgment upon the facts in favor of the original defendant. The present is a writ of error, brought for the purpose of ascertaining the correctness of that judgment.

Three questions have been argued at the bar. — 1. Whether the award of the commissioners, under the treaty with Spain, directing the money to be paid to the defendants, as assignees of Vasse, (which is assumed to be the true state of the fact,) is conclusive upon the rights of Vasse, so as to prevent his recovery in the present action. 2. If not, whether the abandonment of the vessels and cargoes to him, as underwriter, by the owners, and his payment of the losses, entitled him to the compensation awarded, independent of his bankruptcy. 3. If so, then, whether his right and title to the compensation passed by the assignment of the commissioners of bankruptcy, to the defendants, as his assignees, by the true intent and terms of the bankrupt act of 1800, c. 19.

1. As to the first point: —

1. The treaty with Spain, of the 22d of February, 1819, was ratified on the 13th of February, 1821, by the government of the United States. In the 9th article, it provides that the high contracting parties "reciprocally renounce all claims for damages or injuries, which they themselves as well as their respective citizens and subjects may have suffered, until the time of signing this treaty," and then proceeds to enumerate, in separate clauses, the injuries to which the renunciation extends.

The 11th article provides that the United States, exonerating Spain from all demands in future, on account of the claims of their citizens to which the renunciations herein contained extend, and considering them entirely cancelled, undertake to make satisfaction for the same, to an amount not exceeding five millions of dollars. To ascertain the full amount and validity of these claims, a commission, to consist of three commissioners, &c., shall be appointed, &c., and within the space of three years from the time of their first meeting, shall "receive, examine, and decide upon the amount
[*212] and validity of all claims *included within the descriptions above mentioned." The remaining part of the article is not material to be mentioned.

It has been justly remarked, in the opinion of the learned judge who decided this cause in the circuit court, that it does not appear,

from the statement of facts, who were the persons who presented or litigated the claim before the board of commissioners; nor whether Vasse himself was before the board; nor who were the parties to whom or for whose benefit the award was made. We do not think that the fact is material, upon the view which we take of the authority and duties of the commissioners. The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not reëxaminable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tribunal; an amount once fixed is a final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty. But it does not necessarily or naturally follow, that this authority so delegated includes the authority to adjust all conflicting rights of different citizens to the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself, and it is wholly immaterial for this purpose upon whom it may in the intermediate time have devolved, or who was the original legal, as contradistinguished from the equitable owner, provided he was an American citizen. If the claim was to be allowed as against Spain, the present ownership of it, whether in assignees or personal representatives or *bonâ fide* purchasers, was not necessary to be ascertained, in order to exercise their functions in the fullest manner. Nor could they be presumed to possess the means of exercising such a broader jurisdiction, with due justice and effect. They had no authority to compel parties asserting conflicting interests to appear and litigate before them, nor to summon witnesses to establish or repel such interests; and under such circumstances it cannot be presumed that it was the intention of either government to clothe them with an authority so summary and conclusive, with means so little adapted to the attainment of the ends of a substantial justice. The validity and amount of the claim being once ascertained by their award, the fund might well be permitted to pass into the hands of any claimant; and his own rights, as well as those of all others who asserted a title to the fund, be left to the ordinary course * of judicial proceedings in the estab- [* 213] lished courts, where redress could be administered according to the nature and extent of the rights or equities of all the parties. We are therefore of opinion that the award of the commis-

sioners, in whatever form made, presents no bar to the action, if the plaintiff is entitled to the money awarded by the commissioners. The case of Campbell *v.* Mullett, 2 Swanston, 551, is distinguishable. The claim in that case had been laid before the commissioners and rejected by them, on the ground that the party was an alien enemy; and if so he certainly did not come into the purview of the treaty. It was not pretended that the party had any title to the indemnity, unless it could be deemed partnership property, and, as a partner, he was entitled to share in it. The court considered that it was not partnership property in which he had a title; that his claim to any portion of it had been rejected, upon the ground that such claim was not within the treaty; and the indemnity had been granted to the other partners, for their shares only of the joint property, and they took no more than their own shares. The court then proceeded upon the ground that there was neither an original nor a derivative title to the indemnity in the party now seeking to set it up. If an assignment had been shown from them to him, of their own interest in the claim or award, before or after it was made, the case might have admitted of a very different consideration. Whatever, therefore, might be the authority of that case upon general principles, upon which it is unnecessary to pass any opinion, it is inapplicable to the present.

2. The next question is not noticed in the opinion of the circuit court, and turns upon the nature and effect of an abandonment for a total loss to the underwriters. Much argument has been employed and many authorities introduced to prove what rights and interests, possibilities and expectancies may or may not pass by assignment; we do not think it necessary to review these authorities, or the principles upon which they depend upon the present occasion. In general, it may be affirmed that mere personal torts, which die with the party and do not survive to his personal representative, are not capable of passing by assignment; and that vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property, may pass by assignment. But the material consideration here is, whether, upon the principles of the law merchant, the right, title, interest, or possibility, (call it which you may,) to the indemnity awarded in this case, did not pass by the abandonment to Vasse.

We do not think that, upon an examination of the doctrines of insurance, there is any difficulty in this part of the case. It [*214] *does not appear on the record, whether there was, in this instance, any formal instrument of abandonment or not; nor is it material, for the law gives to the act of abandonment, when

accepted, all the effects which the most accurately drawn assignment would accomplish. By the act of abandonment, the insured renounces and yields up to the underwriter all his right, title, and claims to what may be saved; and leaves it to him to make the most of it for his own benefit. The underwriter, then, stands in the place of the insured, and becomes legally entitled to all that can be rescued from destruction. This is the language of the elementary writers, and is fully borne out by Mr. Marshall and Mr. Park, in their treatises on insurance. Mar. on Ins. B. 1 *a*, 14; Park on Ins. c. 9, 228, 279. "Where, (says Mr. Marshall,) as in case of capture, the thing insured and every part of it is completely gone out of the power of the insured, it is just and proper that he should recover at once, as for a total loss, and leave the *spes recuperandi* to the insurer, who will have the benefit of a recapture or of any other accident by which the thing may be recovered." Mr. Park uses equally strong language. He says: "The insured has a right to call upon the underwriter for a total loss, and, of course, to abandon, as soon as he hears of such a calamity having happened; his claim to an indemnity not being at all suspended by the chance of a future recovery of part of the property lost; because, by the abandonment, that chance devolves upon the underwriters." It is very clear that neither of these learned writers meant to confine these remarks to cases where the specific property itself or its proceeds were restored; for the whole current of their reasoning in the context goes to show that whatever may be afterwards recovered or received, whether in the course of judicial proceedings or otherwise, as a compensation for the loss, belongs to the underwriters; and for this purpose they refer to the case of Randall *v.* Cochran, 1 Ves. 98, before Lord Hardwicke, where this very point was adjudged. In that case, the king had granted letters of reprisal against the Spaniards, for the benefit of his subjects, in consideration of the losses which they had sustained by unjust captures; and he appointed commissioners to distribute the produce of these reprisals among the sufferers; and the commissioners would not suffer the underwriters, but only the owners, to make claim for the losses, although the owners were already satisfied for their loss by the underwriters. Lord Hardwicke decreed that the owner should account for the same to the underwriter; and said: "The person who originally sustained the loss, was the owner, but after satisfaction made to him, the insurer. No doubt, but from that time, as to the goods themselves, if restored in specie, or compensation made for them, the insured stood as a trustee for
*the insurer, in proportion to what he paid, although the [*215] commissioners did right to avoid being entangled in ac-

counts, and in adjusting the proportion between them. Their commission was limited in time; they saw who was owner; nor was it material to whom he assigned his interest, as it was in effect after satisfaction made." This case reflects no inconsiderable light upon the point already discussed, as to the conclusiveness of the award of the commissioners. But it is decisive that the assignment by abandonment is competent not only to pass the property itself or its proceeds, if restored, after an unjust capture, but also any compensation awarded by way of indemnity therefor. The case before Lord Hardwicke was the stronger, because the indemnity was awarded to the party by his own sovereign, and not by the sovereign of the captors. Mr. Marshall and Mr. Park manifestly contemplate the case as establishing the principle that any indemnity, however arising, is a trust for the underwriters, after they have paid the loss. Park on Ins. ch. 8, 229; Mar. on Ins. B. 1, ch. 14, § 4.

The case of Gracie *v.* The New York Insurance Company, 8 Johns. 237, recognizes the same principle in its full extent. That was a case of abandonment after a capture, and where there had been a final condemnation, not only by the courts in France, but an express confirmation of the condemnation by the sovereign himself. One question was, whether the jury were at liberty to deduct from the total loss, the value of the *spes recuperandi.* The court held that they were not. Mr. Chief Justice Kent, in delivering the opinion of the court, said: "If France should, at any future period, agree to and actually make compensation for the capture and condemnation in question, the government of the United States, to whom the compensation would, in the first instance, be payable, would become trustee for the party having the equitable title to the reimbursement; and this would clearly be the defendants, (the underwriters,) if they should pay the amount," &c. The case of Watson *v.* The Insurance Company of North America, 1 Binn. 47, proceeds upon the same principles. It admits that the *spes recuperandi* passes by an abandonment to the underwriter; and the question there was whether its value, when not abandoned, was to be deducted from the total loss. We consider it, then, clear, upon authority, that the right to the compensation in this case was in its nature assignable, and passed by abandonment to Vasse; and upon principle, we should arrive at the same conclusion. The right to indemnity for an unjust capture, whether against the captors or the sovereign, whether remediable in his own courts or by his own extraordinary interposition and grants upon private petition or upon public negotiation, is a right
[*216] attached to the *ownership of the property itself, and passes by cession to the use of the ultimate sufferer. If so assign-

able to Vasse, it was equally, in its own nature, capable of assignment to others; and the only remaining inquiry would be, whether it had so passed by assignment from him.

The case of Campbell *v.* Mullet, 2 Swanston, 551, already adverted to, has been pressed upon the attention of the court as indicating, certainly not as deciding, a doctrine somewhat different. In that case, the compensation had been awarded by the commissioners under the British treaty of 1794,[1] to American citizens, for unjust captures made by British cruisers; and there had been condemnations by the highest appellate courts of prize. One argument was that the compensation so granted was not to be deemed a mere donation to the parties who received for their own use, but an indemnity. The Master of the Rolls, in answer to this, said: "It is said that the sums awarded by the commissioners are not matter of bounty or donation. Can they be a matter of right? What is right? That which may be enforced in a court of justice. Had the parties, whose property was condemned by irrevocable sentence, any right? What they obtain after that condemnation, is not founded in right, but in policy between the nations, providing compensation to individuals who have lost property by sentences which are thought unjust. The grounds of relief before the commissioners are the want of any redress in any municipal courts. Whatever the individual obtains is not on the ground of right or private property, but of hardship and injustice. Though this, therefore, is not a case of pure donation, as of a gift, without any thing in the nature of a consideration, yet, for the purpose of being contrasted with property or right, it is a donation, not a restoration of a former right, but from a new fund belonging to an independent authority, a grant to the sufferer for what he lost." Such is the language of the learned judge, and we cannot say that the reasoning is at all satisfactory. It is not universally, though it may ordinarily be one test of right, that it may be enforced in a court of justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced. Neither the king of Great Britain nor the government of the United States is suable in the ordinary courts of justice, for debts due by either. Yet, who will doubt that such debts are rights? It does not follow, because an unjust sentence is irreversible, that the party has lost all right to justice, or all claim upon principles of public law to remuneration. With reference to mere municipal law, he may be without remedy; but with reference to principles of international law, he has a right both to the justice of his own and the foreign sovereign.

The theory, *too, that an indemnification for unjust cap- [*217]

[1] 8 Stats. at Large, 116.

tures is to be deemed, if not a mere donation, as in the nature of a donation, as contrasted with right, is not admissible. It is reasoning against the clear text of the treaty itself. What says the treaty of 1794, § 7? That where American citizens have sustained losses or damages, "by reason of irregular or illegal captures, or condemnations of their vessels or other property, under color of authority or commissions from His Majesty, and adequate compensation cannot be obtained by the ordinary course of judicial tribunals, full and complete compensation for the same will be made by the British government to the said complainants." The very ground of the treaty is that the municipal remedy is inadequate; and that the party has a right to compensation for illegal captures by an appeal to the justice of the government. It was never understood that the case was one to which the doctrine of donation applied. The right to compensation, in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property in a municipal court of justice. The case of Randall *v.* Cochran, 1 Ves. 98, stands upon the true ground. It considers the right of indemnity as travelling with the right of property. In that case it might have been said, in answer to the claims of the underwriters, that they had no title, because it was a case of donation by the crown out of funds provided by reprisals. So, perhaps, the commissioners thought, but Lord Hardwicke decided otherwise. There cannot be a doubt that if the party injured had died before or after the treaty was made, and compensation had been subsequently decreed, it would have been assets, and distributable as such, in the hands of his executors and administrators. The remarks which have been made upon this case, are equally applicable to the provisions for indemnity under the treaty with Spain. It recognized an existing right to compensation in the aggrieved parties, and did not, in the most remote degree, turn upon the notion of a donation or gratuity. It was demanded by our government as matter of right, and as such it was granted by Spain.

We may now come to the point which, indeed, is the only one of any intrinsic difficulty in the cause, whether the right, so vested in Vasse, to compensation passed, under the bankruptcy assignment, to his assignees? That this is a question free of doubt, will not be affirmed by any person who has thoroughly examined it, or read with care the elaborate opinion of the court below. The true solution of it must be found in a just exposition of the object, intent, and language of the statute of bankruptcy of 1800, c. 19. The act begins by an enumeration of the persons who are liable [*218] to be declared bankrupts, *and among them are "under-

writers or marine insurers." This plainly shows the sense of the legislature, that such persons might, by the ordinary course of their business, be reduced to insolvency, and be justly placed within the beneficial operation of such a law. It tends also to the presumption that it might have been the intent of the legislature that the rights devolved upon them, from the nature of the losses for which they were liable, so far as under any circumstances they might or could be valuable rights, should be available as a fund for the benefit of their creditors, in case of their bankruptcy. As the legislature meant to exonerate the underwriter from all future liability for his debts, it would seem natural that the claims abandoned to him, which might constitute the whole of his effective estate, should be vested in his assignees, for the benefit of his creditors. If he possessed claims by abandonment, to the amount of $100,000, which might, by future events, be rendered more or less productive, and which might be, (as they have often been,) salable and transferable in the market, such funds, present or expectant, might well be deemed within the legislative policy, and fit to pass to the creditors by assignment. It might otherwise happen that large recoveries might ultimately vest in the bankrupt, for his own exclusive benefit, upon rights preëxistent, and vested at the time of his bankruptcy. If such a course of legislation would not be unnatural, let us next see what is the precise language of the statute itself. The fifth section declares that it shall be the duty of the commissioners, after the party has been declared a bankrupt, "to take into their possession all the estate, real and personal, of every nature and description, to which the bankrupt may be entitled, either in law or equity, in any manner whatsoever, &c.; and, also, to take into their possession and secure all deeds and books of accounts, papers, and writings belonging to the bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen or appointed."

These words are certainly very general and comprehensive. "All the estate, real and personal, of every nature and description, in law or equity," are broad enough to cover every description of vested right and interest, attached to and growing out of property. Under such words, the whole property of a testator would pass to his devisee. Whatever the administrator would take, in case of intestacy, would seem capable of passing by such words. It will not admit of question that the rights, devolved upon Vasse by the abandonment, could, in case of his death, have passed to his personal representative; and, when the money was received, be distributable as assets. Why, then, should it not be assets in the hands of the assignees? *Considering it in the light in which Lord [*219] Hardwicke viewed it, as an equitable trust in the money,

it is still an interest, or, at all events, a possibility coupled with an interest. Besides, "all deeds, books, accounts, papers, and writings of the bankrupt," are to be taken into possession. Now, the abandonment, and other documents connected with it, fall precisely within these terms; and, as we shall immediately see, whatever is taken possession of by the commissioners, is to be passed to the assignees. The sixth section provides, "that the commissioners shall assign, transfer, or deliver over, all and singular the said bankrupt's estate and effects aforesaid, with "all muniments and evidences thereof," to the assignees so chosen. And, for the most part, the words "estate and effects" are used throughout the act, as descriptive of the property passing under the assignment. The 11th, 12th, and 13th sections of the act respect more particularly the transfer of the real estate, of the mortgages, and of the debts of the bankrupt. It is only necessary to say that they contain no language abridging the proper inferences deducible from the language of the fifth section.

The 18th section contains provisions respecting the surrender and examination of the bankrupt, and are very material. It provides that upon such examination, he shall "fully and truly disclose and discover all his or her effects and estate, real and personal, and how and in what manner, and to whom and upon what consideration, and at what time or times, he or she hath disposed of, assigned, or transferred any of his or her goods, wares, or merchandise, moneys, or other effects and estate; and of all books, papers, and writings, relating thereunto, of which he or she was possessed, or in which he or she was in anywise interested or entitled, or which any person or persons shall then have, or shall have had in trust for him or her, or for his or her use, at any time before or after the issuing of the said commission; or whereby such bankrupt, or his or her family, then hath or may have, or expect any profit, possibility of profit, benefit, or advantage whatsoever, &c." It then goes on further to provide that the bankrupt shall, upon such examination, execute in due form of law, such conveyance, assurance, and assignment, of his or her estate, whatsoever and wheresoever, as shall be deemed and directed by the commissioners to vest the same in the "assignees;" and also requires the bankrupt to deliver up "all books, papers, and writings relating thereunto," which are in his possession, custody, or power, at the time of the examination. Upon his default in these particulars he is deemed a fraudulent bankrupt, and deprived of a right to a certificate of discharge, and subjected to severe punishments. If there were any doubt upon the meaning of the language of

[* 220] *the fifth section, we think it is cleared up and illustrated by that of the present. Here, the words "profit, possibility

of profit, benefit, or advantage whatsoever," are used, and show that mere interests *in præsenti*, and capable of present enjoyment, were not alone within the scope of the legislative enactments, but also all such interests, or possibilities of interest, as might thereafter beneficially arise from present vested rights. It extends to such effects and estate, "whereby the bankrupt then hath, or may have, or expect any profit." It has been supposed that this clause looks solely to property, which was not capable of assignment at the time of the bankruptcy, because not then vested; inasmuch as the bankrupt himself, and not the commissioners, is required to make an assignment of it. If this were so, it would not affect the present case, because we are of opinion that the claim under consideration was completely vested in right and interest in Vasse, at the time of his bankruptcy. We think, however, that this clause does not justify so narrow an interpretation. The disclosure is required of estate and effects, in which the bankrupt was interested as well before as after the issuing of the commission; and the bankrupt is required to execute conveyances, not of such estate and effects merely as accrued after the commission, but of his estate, "whatsoever and wheresoever." The object of the provision was to make such conveyances auxiliary to, and confirmatory of the assignments made by the commissioners; and, we believe that, in practice, it was so generally understood and acted on, while the statute was in force. The 50th section of the act has been supposed to demonstrate the correctness of the construction of the statute contended for by the counsel for the original plaintiff. It declares "that if any estate, real or personal, shall descend, revert to, or become vested in any person, after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate, &c., all such estate shall, by virtue of this act, be vested in the said commissioners, and shall be by them assigned and conveyed to the assignees, &c. This section plainly refers to estate to which the bankrupt had no right or title whatever, in law or equity, vested in interest or in possession, at the time of his bankruptcy. The cases put are of property descending, reverting to, or becoming vested in the bankrupt. In respect to a descent cast after the bankruptcy, it is manifest that nothing could pass by any antecedent assignment of the commissioners.

The heir, during the lifetime of his ancestor, has no right, claim, title, or interest in the ancestral estate. It is a mere naked expectancy, liable to be defeated at the will of the ancestor at all times; and in no just sense, a possibility of interest, a right in the thing itself. The other words, "reverting *to, or become [*221] vested" in the bankrupt, require a like interpretation. They allude to cases where the party had nothing vested in him as a sub-

sisting interest, either absolute or contingent, *in esse* or *in futuro*, until after the bankruptcy; and, when any such interest falls in before the certificate of discharge, the commissioners, and not the bankrupt, are to assign it; a circumstance which demonstrates that no stress ought to be laid upon that part of the 18th section, already alluded to, respecting a conveyance by the bankrupt himself, except as a confirmation, and not as a principal assurance. It seems to us, then, that the 50th section aids, rather than shakes the interpretation of the statute which has been already announced. It applies to no possibility of profit, benefit, or advantage, vested at the time of the bankruptcy, (as the present case is,) but to interests accruing to the party for the first time, *de jure* as well as *de facto*, after the bankruptcy. This view of the matter renders it unnecessary to consider whether there is any substantial difference between the English statutes of bankruptcy and our own, on this subject; and, of course, in the authorities applicable to it. Our opinion proceeds upon the purview and objects, and on the terms, of our own statute; and we are, accordingly, of opinion that the judgment of the circuit court ought to be reversed, and a judgment entered in favor of the original defendants. It is to be understood that, upon the last point, this is the opinion of the majority of the court.

The cause must be remanded, with directions to enter a judgment accordingly, for the original defendants.

13 P. 409; 14 P. 95; 16 P. 221; 11 H. 529; 17 H. 612.

CHARLES W. KARTHAUS, Plaintiff in Error, *v.* FRANCISCO YLLAS Y FERRER and others, Defendants in Error.

1 P. 222.

To impeach an award made under a conditional submission, upon the ground that the award does not cover all matters submitted, the party must distinctly show that there were other matters submitted, of which express notice was given to the arbitrator, and that he omitted to determine them.

An ambiguity in an award, not affecting the interest of the party objecting to it, is not available by him.

Where a submission was made by one partner of a "late firm," and it did not appear that any other partner existed, a direction in an award that the firm should pay, was held to be equivalent to a direction that he should pay.

It is not necessary to the validity of an award that each party should be ordered to do, or not to do something.

THE case is stated in the opinion of the court.

Hoffman and *Mayer*, for the plaintiff.

Wirt, (Attorney-General,) contrà.

*TRIMBLE, J., delivered the opinion of the court. [*225]

This was an action of debt, brought by Francisco Yllas, and Josef Antonio Yllas, against Charles W. Karthaus, on an arbitration bond, in the circuit court of the district of Maryland.

The defendant, after oyer of the condition of the bond, pleaded no award made, &c. The plaintiff replied, setting forth the *award in *hæc verba*, and assigning a breach; the defend- [*226] ants demurred generally, and the plaintiff joined in demurrer.

The circuit court having given judgment upon the demurrer in favor of the plaintiffs, the defendant has brought the case up, by writ of error, for the consideration of this court.

The first and principal ground relied on by the plaintiff in error, for the reversal of the judgment, is, that the award is not agreeable to the submission, in this: that two several distinct controverises, the first between the plaintiffs and the late house of Charles W. Karthaus and Co., and the second between the plaintiffs and Charles W. Karthaus, individually, were submitted to the referees, and that they left the latter undetermined. The condition of the bond, after reciting that certain disputes, differences, and controversies have arisen and are still depending between the above-bound Charles W. Karthaus, acting for his late house of Charles W. Karthaus and Co., and for himself and the above-named Francisco Yllas y Ferrer, and Josef Antonio Yllas, &c., "refers the same to the referees named, and their umpire, and binds the said Charles W. Karthaus, &c., to abide by and perform their award;" so as such award, &c., "of the arbitrators, of and in the premises, be by them made and given up in writing, under their hands and seals, ready to be delivered to each of the said parties in controversy, in fifty days."

The arbitrators and their umpire, within the time limited by the submission, made and delivered their award in writing, under their hands and seals, in the following words, to wit: "We, the undersigned, Henry Child and Lewis Brantz, as arbitrators, and Michael M'Blair, as umpire, acting in virtue of the annexed bond or instrument of writing, do hereby award and adjudge that the late firm of C. W. Karthaus and Co., pay to Francisco Yllas y Ferrer and Josef Antonio Yllas, or their representatives, the sum of $1,475, for the balance of the general account current between the parties, and also the sum of $1,398, for a balance arising out of moneys received for the brig Arogante Barcelonese, and cargo; in which award, a parcel of cutlasses or their proceeds are considered as becoming the property of the said Yllas y Ferrer."

It is plainly seen, from the face of the award, that the arbitrators have not contradistinguished between Charles W. Karthaus, as a

member of the late house of Charles W. Karthaus and Co., and Charles W. Karthaus, as an individual, unconnected with his late house. The argument is, that this omission of the referees vitiates the award. It is said that this, being a conditional submission *ita quod*, the arbitrators were bound to pursue the submission [*227] strictly, and to award of and *concerning every matter referred to them. In support of this argument, the counsel referred to Randall *v.* Randall, 7 East, 81, and several other cases less apposite.

That there is a class of cases in the books, in which arbitrators have been held to a more than ordinary strictness in pursuing the terms of the submission, and in awarding upon the several distinct matters submitted, upon the ground of the submission being conditional, *ita quod*, is conceded. The case of Randall *v.* Randall is a leading case of that class. Lord Ellenborough, C. J., in delivering the opinion of the court, says: "The arbitrators had three things submitted to them; one was to determine all actions, &c., between the parties; another was to settle what was to be paid by the defendant for hops, poles, and potatoes, in certain lands; the third was to ascertain what rent was paid by the plaintiff, to the defendant, for certain other lands. The authority given to the arbitrators was conditional, *ita quod*, they should arbitrate upon these matters by a certain day. The arbitrators have stopped short, and have omitted to settle one of the subjects of difference stipulated for."

This case was adjudged, according to the rule laid down in the books; that if the submission be conditional, so as the arbitrator decide of and concerning the premises, he must adjudicate upon each distinct matter in dispute, which he has noticed. Kyd, 177.

But the rule is to be understood with this qualification; that in order to impeach an award, made in pursuance of a conditional submission, on the ground only of part of the matters in controversy having been decided, the party must distinctly show that there were other points in difference, of which express notice was given to the arbitrator, and that he neglected to determine them. Caldwell, 105; Kyd, 177; Cro. Car. 216; Baspole's case, 8 Co. 98; Ingraham *v.* Milnes, 8 East, 446.

That Lord Ellenborough understood and intended to apply the rule as thus qualified, in Randall *v.* Randall, is manifest. For Mr. Espinasse, in commenting upon Baspole's case, having observed that it is said in that case that though there be many matters in controversy, yet if only one be signified to the arbitrator he may make an award for that, for he is to determine according to the *allegata et probata;* and it is in every day's practice that an award may be good

in part and bad in part. Lord Ellenborough, in answer to that argument, replies: "That is, where it does not appear there is any notice to the arbitrator, on the face of the submission, that there is any other matter referred to him than those which are mentioned to him at the time of the reference. But here, it does expressly appear that there was another matter referred on which there is no arbitrament."

*In this case, it is not pretended that any notice was [*228] given to the arbitrators of any other matter, unless that notice was given on the face of the submission.

The question then is, does it distinctly appear, from the face of the submission, that any other point of difference between parties was submitted, and of which the submission itself gave the arbitrators notice, but which they have neglected to determine.

If, as the argument supposes, there was any point in difference which concerned Charles W. Karthaus, individually, as contradistinguished from the points in difference which concerned him as Charles W. Karthaus, of the late firm of Charles W. Karthaus and Co., what was that point of difference?

No satisfactory answer has been given, and it is believed none can be given, to this inquiry. How then can it be maintained that a distinct point in difference between the parties was referred, and by the reference itself notified to the referees, which they have neglected to determine? The case of Ingraham *v.* Milnes is a strong authority to show that, although the submission be conditional, *ita quod*, there must be a distinct specification, as in Randall *v.* Randall, to sustain the objection that part has been omitted by the arbitrators. Here the submission is in very general, and we think, in very vague and ambiguous terms. It speaks of disputes, differences, and controversies, between Charles W. Karthaus, acting for the late house of Charles W. Karthaus and Co., and for himself and the plaintiffs. But how or in what he acted, for the one or the other, is not specified. The terms "late house," imply the former existence, but present non-existence, of the late house of Charles W. Karthaus and Co. He may be the only surviving partner, the firm having ceased, by the death of the other members. But if the firm was continuing, Charles W. Karthaus, while he must be admitted to be perfectly competent to submit to reference his own interests in the firm, could not by his submission bind his partners. He might bind himself to perform whatever the award directed the firm of which he was a member, to do; so that, either way, it was a submission of his own interest only. In order to overturn the award, it is not enough that he may have had different and distinct interests in his individual and

in his partnership character. It is a settled rule, in the construction of awards, that no intendment shall be indulged to overturn an award, but every reasonable intendment shall be allowed to uphold it. Thus if a submission be of all actions, real and personal, and the award be only of actions personal, the award is good; for it shall be presumed no actions real were depending between the parties. Kyd, 72, and Baspole's case, before cited.

[*229] *So in this case, although the submission speaks, in general terms, of disputes, differences, and controverises with Charles W. Karthaus, acting for his late house of C. W. Karthaus and Co. and for himself, it shall not be intended there were any controversies with C. W. Karthaus, individually, other than those decided by the arbitrators. If any such did exist, inasmuch as they are not specifically and distinctly set forth in the submission, so as to give notice to the arbitrators, it was the duty of the party to show, by averment and proof *aliunde*, they were brought before the referees.

There is no analogy between this case and Lyle *v.* Rogers, 5 W. 394, cited at the argument. In that case, it was decided that where claims against a party, both in her own right and in her character of administratrix, were submitted to arbitrators, it was a valid objection to the award, that it awarded a gross sum to be paid by her, without distinguishing between what was to be paid by her in her own right, and what in her representative character. The chief justice, in delivering the opinion of the court, explains the reason and ground of the decision, by observing: "If this award was made against Mrs. Dennison, as administratrix, she would not only be deprived, by its form, of the right to plead a full administration, (a defence which might have been made before the arbitrators, and on which their award does not show, certainly, that they have decided,) but also of the right to use it in the settlement of her accounts, as conclusive evidence that the money was paid in her representative character. If this objection to the award is to be overruled, it must be on the supposition that it is made against her personally; yet the statement of facts shows the claim against her to be in her representative character." This reasoning cannot apply to the case before the court. It is of no sort of consequence to C. W. Karthaus, whether he is directed to pay as Charles W. Karthaus, individually, or as Charles W. Karthaus, of his late house of C. W. Karthaus and Co. In each case he is bound personally to pay, having bound himself so to do by the submission; and the award, if in any case it would be evidence for him against the firm, would not be conclusive, as he had no power to bind his partners, if any existed, by his submission. It is objected that the award is not certain, final, and mutual. It was

said in argument that, as the first sum awarded is expressed to be for a "balance of the general account current between the parties, the general account current must be understood to include all accounts between them; and hence that the second sum awarded, for a balance arising out of moneys received for the brig Arogante Barcelonese, is included in the first, and the party thus twice charged; or, at least, that it does not certainly appear otherwise."

* We think there is no foundation for this argument. To [* 230] indulge such a supposition would impute either manifest injustice or gross negligence to the referees. Great stress was laid, in the argument, on the uncertainty of the closing clause of the award, in these words, "in which award a parcel of cutlasses are considered as becoming the property of said Yllas y Ferrer." There is considerable doubt and uncertainty as to the meaning of the arbitrators, in the use of these terms. And had this uncertainty appeared in any part of the award intended for the benefit of the defendant, it would perhaps be fatal to the whole award. Had that been the case, it would be hard and unjust to compel him to perform that part of the award which is onerous to him, when he could not have, on account of its uncertainty, that which would be beneficial to him. But however doubtful the precise intent and meaning of this part of the award may be, it is certain it was intended as a benefit, in some way, to Yllas y Ferrer, over and above the two sums of money directed to be paid to the plaintiffs. The defendant can have no reason to complain that the plaintiffs or either of them may not, on account of this uncertainty, be able to obtain all the benefits intended by the award; nor can it furnish any reason for withholding from them that to which they are certainly entitled.

It is deemed a sufficient answer to the objection of want of mutuality in the award, to remark that great stress was laid, in the early cases, upon the mutality of an award; but at present it is by no means considered necessary that each party should be directed to do or not to do any particular thing; Cald. 113. Two had submitted to an award; nothing was awarded as to one party, but that all actions should cease. The court held it a good award; Harris *v.* Knipe, 1 Levz, 58.

In Palmer's case, 12 Mod. 234, one party was directed to pay money to the other, without any directions being given to the latter in any way; and again, it was awarded that A should pay B 40 shillings for a trespass; Freeman, 204. The respective awards were considered unimpeachable. These cases fully establish the principle above laid down. An award is regarded as final, when it is an absolute conclusive adjudication of the matters in dispute; and there

is no reason to doubt the conclusiveness of the adjudication in this case, as to the two sums of money directed to be paid; and that the award will operate as a bar to any future litigation, upon the accounts for which they are given. Again, it is objected that the award directs an act to be done by strangers. This objection grows out of the direction in the award, that "the late firm of C. W. Karthaus and Co., pay, &c." Whatever might be the force of this objection, if it were true in point of fact, we cannot so regard it. So far [*231] as *appears upon the record, the late firm or house of C. W. Karthaus and Co. and C. W. Karthaus are one and the same person; or, more properly speaking, it does not appear that there is any other person *in esse*, belonging to that firm, than C. W. Karthaus himself. If there be any other person *in esse*, of the late house of C. W. Karthaus and Co., it cannot be truly affirmed that he and the house of which he was a partner are strangers to each other. But we cannot, consistently with the rules of law, presume or intend there is any other; indeed, in support of the award, it may reasonably be intended there is not, as the party objecting was cognizant of the fact, and might have shown it if true, but has not. The direction that the late firm of C. W. Karthaus and Co. shall pay, unquestionably includes C. W. Karthaus, and no other person appearing to exist, it is equivalent to a direction that he shall pay. This reason is applicable to the last ground assumed by the counsel for the plaintiff in error, for a reversal of judgment, namely, that the replication is insufficient, because, in assigning a breach, it only alleges C. W. Karthaus had not paid. As no other was or could be bound by the submission and award to pay, and he was bound, it was a sufficient assignment of a breach of the condition of his bond to allege that he had not paid the money awarded in favor of the plaintiffs.

Upon the whole, it is the opinion of this court that there is no error in the judgment of the circuit court, and the same is affirmed, with costs, and damages.

JUNIUS K. HORSBURG, Devisee of James Henderson, Appellant, *v.* MARTIN BAKER and HANNAH his Wife, FRANCIS CLARKE, ROBERT BOYCE, and PETER MASON, for himself, and as Guardian to Susannah R. Hamlett.

1 P. 232.

Where a female slave was conveyed for the life of the grantee, reserving to the grantor the reversion and right to her increase, with a clause of forfeiture upon any sale by the grantee, though the reversioner cannot have the aid of a court of equity to enforce the forfeiture, he may, to obtain discovery and an injunction to restrain alienation until the title can be tried at law.

After discovery had, a suit for discovery merely cannot be revived.

THE case is stated in the opinion of the court.

Wickliffe, for the appellants.

No counsel for the appellees.

*MARSHALL, C. J., delivered the opinion of the court. [*233]

In the year 1813, James Henderson and his wife filed their bill in the court of the United States for the seventh circuit and district of Kentucky, stating that Alexander Horsburg, the former husband of the plaintiff, did, by deed bearing date the 25th day of April, in the year 1787, confirm to Martin Baker and Hannah his wife, for their lives and the life of the survivor, then residing in the county of Halifax, in Virginia, a negro girl named Charlotte, previously loaned to them, (which deed was recorded,) reserving to himself and his heirs the reversion of the said slave and her increase, and prohibiting any alienation of them, under the penalty of forfeiting the loan.

This deed was recorded on the 4th day of July, 1787, in the court of Hustings for the town of Petersburg, the town in which the said Horsburg resided. The bill further states that the said Alexander Horsburg departed this life in the year 1798, having first made his last will in writing, whereby he bequeathed the residue of his estate to his wife, who afterwards intermarried with the plaintiff, James Henderson.

The bill proceeds to state that Martin Baker and wife have removed to Kentucky, with the slave Charlotte and her increase; whom they profess to hold as their absolute property; and that the plaintiffs fear that they will be secreted or conveyed out *of the State to places unknown. The plaintiffs further [*234] allege that they are unable to prove the identity of the said slaves, and pray that the said Baker and wife may be compelled to discover their number and names, and may be decreed to give security for their forthcoming, when the life-estate should determine.

The court awarded an injunction, to restrain the defendants from removing Charlotte, and her issue, out of the State.

In May, 1814, the plaintiff, James Henderson, filed an amended and supplemental bill, stating the death of his wife, and praying that the suit might be continued in his name. The bill also states that Baker and wife had sold Charlotte and her increase to Francis Clarke and Robert Boyce, who intend removing them out of the State, and concealing them. It prays that the slaves may be rendered to the plaintiff, and that Clarke and Boyce may be restrained from removing them. The court extended the injunction to the other defendants.

The defendants, Baker and wife, file their answer, denying the loan, and insisting that certain friends of the defendant, Hannah, subscribed the sum of forty-three pounds, which was placed in the hands of Alexander Horsburg, to purchase the slave Charlotte for her. They insist on their title, but give a full description of all the descendants of Charlotte.

The defendants, Clarke and Boyce, also deny the right of the complainant.

In 1817, the plaintiff again amended his bill, and charged that Baker and wife had brought the deed from Horsburg with them into Kentucky, as their title to Charlotte.

In November, 1819, Junius K. Horsburg appeared, by his attorney, and leave was given him to file a bill of revivor. The bill is filed by the said Horsburg, as the administrator and devisee of James Henderson, and as the heir and only child of Mrs. Henderson, the wife of the said James, and the former wife and devisee of Alexander Horsburg.

The bill recites the previous proceedings in the cause, exhibits the will of James Henderson and his letters of administration, and charges the sale to Boyce and Clarke since the institution of this suit, who purchased at a low price, with the intention of removing the slaves beyond the jurisdiction of the court.

In answer to this bill, Baker and wife say that, in the year 1773, Thomas Simmons and others, named in the answer, contributed forty-three pounds, for the purpose of purchasing a negro girl for the said Hannah, which sum was placed in the hands of Alexander Horsburg, as their agent, with instructions to convey the said negro to the defendants for their lives, and to their children, after [* 235] the death of the survivor. They believe * this plan was adopted for the purpose of protecting the property thus given by her friends, from the creditors of her husband. Under these instructions, Charlotte was purchased and delivered to them. In the year 1787, after the defendants had been in peaceable possession of Charlotte about fourteen years, the said Horsburg, without any previous communication of any sort, sent to them, then residing in Halifax, about one hundred and twenty miles from Petersburg, the deed, a copy whereof is annexed to their answer. They also say that, on the same day, the said Horsburg executed another writing, obliging himself to convey Charlotte and her increase, after the death of the defendants, to their children, to which they refer, as being filed in the office of the circuit court for the county of Garrard. They also refer to a letter written by the said Horsburg, which they say was given up to be filed in the cause.

In May, 1824, leave was given to file an amended bill, and the cause was sent to the rules for further proceedings.

The amended bill charges that Clarke and Boyce purchased, not only pending the suit, but with knowledge in fact thereof; that they purchased the said slaves for a trifle, less than half their value, in consequence of an agreement to take upon themselves the risk of the title.

The deposition of John T. Mason states that the deponent, as counsel for the original plaintiff, called on the defendants, Baker and wife, who, after some time, admitted that they claim Charlotte and her offspring under a deed from Alexander Horsburg, which they showed him.

It is a copy or the original of the deed filed in the cause. They also showed the witness several other papers and letters in relation to the subject, and particularly two letters from Alexander Horsburg, which he believes to be the same, or to the same purport, with those filed in the cause.

The copy of the deed of 1787, recorded in the court for the town of Petersburg, is filed, together with the will of Alexander Horsburg, and of James Henderson; but neither the subsequent deed, stated in the answer of Baker and wife to have been executed by Alexander Horsburg, for the purpose of securing Charlotte and her offspring to the children of Baker and wife, nor the letters from Horsburg, are found on the record.

The last amended bill was taken for confessed, and the cause set down for hearing. The court directed the bill to be dismissed.

Baker and wife being alive, the plaintiff could have no pretence to recover the slaves claimed by the amended bill, except under the clause of forfeiture for alienation, which the deed contains.

*As a court of chancery is not the proper tribunal for [*236] enforcing forfeitures, no decree for the purpose of effecting that object ought to have been made. But the plaintiff had a right to apply to the court of chancery for a discovery, in order to enable him to proceed at law, either immediately or on the death of Martin Baker and his wife; and also, for an injunction, to restrain the tenants for life from removing the slaves out of the country. The decree dismissing the bill, entirely defeats both these objects.

The bill, therefore, ought not to have been dismissed, unless the plaintiff had failed to show any title which might be litigated in a court of law. The court will not, in this case, decide upon the title; but is of the opinion that it authorizes the plaintiff to come into a court of chancery to pray for a discovery; and, as there was reason to fear that the property would be removed, to obtain security for its

forthcoming, if the title should be determined in his favor. This bill was, in its origin, merely a bill of discovery, and *quia timet.* Before the answer was filed, the original defendants are alleged to have sold the slaves, and, by that act, to have forfeited their life-estate. The amended bill, therefore, prays a decree for the slaves themselves. After this bill was filed, the defendants, Baker and wife, answer, and make the discovery with respect to the descendants of Charlotte.

In this state of the cause the plaintiff dies, and his administrator and devisee files a bill in the nature of a bill of revivor.

After answer and discovery the rule is, that a suit brought merely for discovery cannot be revived. 1 Mad. 217; 1 Dick. 133; 10 Ves. 31. Its object is obtained, and the plaintiff has no motive for reviving it. But such a bill ought not to be dismissed. 1 Mad. 217; 1 Atk. 286.

The court might properly order that no further proceedings be had in the case. Had this bill, then, been merely a bill of discovery, at the death of the original plaintiff, it ought not to have been sustained in the name of his devisee, because the discovery was made. But it had then become a bill for relief. The relief, however, prayed, is for a forfeiture, which might have been enforced at law. The present plaintiff was in possession of all the evidence which was necessary to support his action at law, and was not driven into a court of chancery for the purpose of obtaining its aid. In such circumstances, it was proper to dismiss the bill, so far as it sought relief on the ground of forfeiture; but it ought to have been dismissed without prejudice to the legal rights of the plaintiff; an absolute dismission may be considered as a decree against the title.

The decree, therefore, is to be reversed, and the cause re-
[* 237] manded, * with directions to dismiss the bill, so far as it asks relief, without prejudice.

The injunction may be continued in the discretion of the court till the plaintiff has time to institute a suit at law.

This cause came on, &c., on consideration whereof, this court is of opinion that, after the discovery sought by the original bill was obtained, the suit ought not to have been revived, nor ought the bill, in the nature of a bill of revivor, to have been entertained, because the relief sought by that bill was solely to enforce a forfeiture, to which the plaintiff's title, if he has any, is complete at law. It was, therefore, proper to refuse the relief for which that bill prayed; but as a general decree for a dismission on the merits may be considered as a decree against the title, on which the court ought not to have decided, the bill ought to have been dismissed without prejudice. It is therefore the opinion of this court that there is error in so much

of the decree of the circuit court as dismissed the bill of the plaintiff generally; and that the said decree ought to be reversed, and the cause remanded to the circuit court, with directions to dismiss so much of the plaintiff's bill as prays relief on the ground of forfeiture, and to continue the injunction at the discretion of the court.

CHRISTIAN BREITHAUPT AND HENRY SHULTZ, Defendants below, *v.* THE BANK OF THE STATE OF GEORGIA, and others.

1 P. 238.

The circuit court has not jurisdiction of a case in which a corporation is defendant, if the record contains no averment concerning the citizenship of the corporators.

THIS was a bill in equity filed in the circuit court of the United States for the district of Georgia.

The plaintiffs were alleged to be citizens of South Carolina. The Bank of the State of Georgia was averred to be a body corporate, but where created, and of what State its corporators were citizens, did not appear on the record. The only question here was one of jurisdiction.

M'Duffie, for the plaintiffs.

Berrien and *Wilde*, contrà.

* By the COURT. This is not a case within the jurisdiction [* 240] of the courts of the United States. The record does not show that the defendants were citizens of Georgia, nor are there any distinct allegations or averments that the same was the fact as to the stockholders in the bank.

This cause came on, &c., on consideration whereof this court is of opinion that, as the bill does not aver that the corporators of the Bank of the State of Georgia, which bank is defendant in the suit, are citizens of the State of Georgia, the circuit court has no jurisdiction of the cause, and can grant no relief. It is therefore ordered to be certified to the circuit court, as the opinion of this court, that, in the present state of the pleadings, it not appearing that the defendants are citizens of the State of Georgia, the complainants are not entitled to relief in that court.

16 H. 314.

JAMES FINDLAY, WILLIAM LYTLE, CHARLES VATTIER, ROBERT RITCHIE, and others, Citizens of Ohio, Appellants, *v.* THOMAS S. HINDE, AND BELINDA, his wife, Citizens of Kentucky, Appellees.

1 P. 241.

Where the equity of a bill rests upon the loss of a deed, an affidavit of its loss should be annexed to the bill; but the want of it is only cause of demurrer, and is waived by answering.

To a bill for specific performance of a contract to convey land, the vendor is a necessary party, though he has parted with all title, and his grantees are made parties.

If a vendor has conveyed, and the deed is not lost, but lacks some legal formality to pass the legal title, the vendee may have relief in equity, by a decree for specific performance, against the vendor, and those claiming under him with notice.

THE case is stated in the opinion of the court.

Webster and *Caswell*, for the appellants.

Doddridge and *Jones*, contrà.

[*243] *TRIMBLE, J., delivered the opinion of the court.

This is a contest for lot number 86 in the city of Cincinnati. The appellees, who were complainants in the court below, claim the lot in right of the complainant, Belinda, as half-sister and heir at law of Thomas Doyle, jun., only son of Thomas Doyle, the elder.

In the year 1795, Abraham Garrison became the proprietor, and was seised in fee of the lot in controversy.

The bill charges that on the 10th of September, 1799, Abraham Garrison, being so seised, sold the lot to William and Michael Jones, brothers and partners in trade, for the price of $250, part of which being paid, the said Abraham Garrison gave a receipt for the same, binding himself to convey, which receipt is annexed and made part of the bill; that a few days after the said Abraham Garrison made a deed of conveyance, attested by two witnesses, to the Jones's, for the lot, which deed has been lost by time and accident; that on the 26th of March, 1800, William Jones, in behalf of the firm of William and Michael Jones, conveyed the lot to Thomas Doyle, jun.; and that, although the intention of that conveyance was to pass the title of both partners, and is in equity good for that purpose; yet as it did not pass the legal title of Michael Jones, he has since, in the year 1819, for the purpose of confirming the title of the complainants, made a deed of confirmation to the complainant, Thomas S. Hinde.

Various other matters are stated in the bill, as strengthening and confirming the equitable right of the complainants, in right of the said Belinda, as heir at law of Thomas Doyle, jun.

The bill charges that the defendants have fraudulently, and with notice of the claim of Thomas Doyle, jun., and of the complainants, subsequently obtained conveyances of the legal title from and under Abraham Garrison, and seeks discovery and relief.

The defendants, James Findlay, William Lytle, Charles Vattier, and Robert Ritchie, answered; and the bill was taken as confessed, against the other defendants, for want of answer.

The answer put in issue, generally, the allegations of the bill, and the title of the complainants; but it is not at present necessary to say whether they do or do not sufficiently deny notice.

It appears from the answers and title deeds filed in the cause that all the defendants, as well those who have not answered as those who have, are interested in defending the title * of [*244] the lot, they standing in relation to each other as vendors, warrantees, and vendees.

At the hearing of the cause in the circuit court, the defendants, Vattier and Ritchie, were decreed to convey to the complainants; and costs were decreed against all the defendants; and all of the defendants have joined in the appeal to this court.

The appellants contend that the decree is erroneous, upon several grounds, which have been very elaborately argued at the bar. Among these, two preliminary objections have been raised to the regularity of the proceedings and decree; and if either of them be sustained, it will be unnecessary to consider the more important objections made to the decree, upon the merits of the conflicting claims of the parties.

The first preliminary objection is, that no affidavit of the loss of the deed from Garrison to the Jones's, "by time and accident," as charged in the bill, was made and annexed to the bill.

In support of this objection the counsel for the appellants have cited numerous authorities to prove that when the loss of a deed or other instrument is made the ground for coming into a court of equity for discovery and relief, an affidavit of its loss must be made and annexed to the bill, and that the absence of such affidavit is good cause of demurrer to the bill. But no case has been cited, and none is recollected, in which it has been decided that, although the party charged failed to demur for that cause, but answered over to the bill, or permitted it to be taken for confessed, by default against him, yet the absence of the affidavit is sufficient cause for a reversal of the decree.

If such a decided case were shown, we should exceedingly doubt its reason and authority.

The objection appears to us to be of that character which ought to be made at the earliest practicable stage of the cause; and if not

then made should be considered as waived. Upon the face of the bill there is an apparent jurisdiction, and the use of the affidavit is only to show, *primâ facie*, the truth of the matter.

It is not like the cases in which there is an apparent want of equity on the face of the bills, admitting all the facts stated to be true; nor like the case in which it is apparent on the face of the bill that a court of equity could have no jurisdiction of the matters charged. In such cases, although a demurrer will be to the bill, yet none is necessary, inasmuch as there is either an absolute want of equity or of jurisdiction.

We think the supposed former existence and loss of the deed from Garrison to the Jones's was not the only ground for appeal-
[*245] ing * to a court of equity for relief. If the deed, as stated in the bill, were produced, it, in consequence of not being proved, or acknowledged and recorded, would be insufficient as a legal title against subsequent purchasers without notice. The complainants had a right to a discovery, upon the ground of notice, against the defendants; and if notice should be brought home to them, the complainants had a right to relief by a decree quieting the title, &c.

Again: if the complainants should fail, as we think they have failed, to prove by competent and satisfactory evidence the former existence, execution, and contents of a formal deed of conveyance, sufficient to pass the legal title, we perceive no reason why they might not rely upon the executory contract contained in the receipt; and in this latter view of the case the jurisdiction of the court of equity is unquestionable; and a general demurrer to the whole bill for want of an affidavit would not be sustainable. At most, a demurrer to only so much of the bill as stated and relied on the deed, could have been maintained for want of an affidavit of its loss.

The second preliminary objection to the proceedings and decree is the want of proper parties.

It has been argued for the appellants that Abraham Garrison was a necessary party; and that, as the complainants claim through him by an executory contract, he ought to have been before the court before any decree could be made against the defendants, who also claim through and under him by a subsequent conveyance of the legal title.

The counsel for the appellees endeavored to overcome this objection, by arguing that the deed from Garrison to the Jones's conveyed the title from him to them; that the contract was, therefore, not executory, but executed between Garrison and the Jones's; and further, if it were not so, that there was no necessity for bringing Garrison

before the court, he having conveyed away the legal title to the appellants, and that, therefore, no decree could be made against him.

We have already said the evidence in the cause does not establish a formally executed conveyance from Garrison to the Jones's, sufficient to convey the legal title; and that the complainants are, therefore, driven to rest their case upon the executory contract contained in the receipt.

Under this aspect of the case, was it necessary to make Garrison a party to enable the court to pronounce a decree between the parties really before the court?

In the case of Symmes *v.* Guthrie, 9 C. 25, this court declared the general rule to be, that "regularly, the claimants who have an equitable title ought to make those whose title they assert, as well as the person for whom they claim a *conveyance, [*246] parties to the suit." "And that, for omitting to do so, an original bill may be dismissed."

In the case of Mallon and others, *v.* Hinde, 12 W. 193, 196, the complainants claimed a survey in the military district in Ohio, by virtue of certain executory contracts with Elias Langham, and the heirs of Sarah Beard, and sought, by their bill against Hinde, to obtain a conveyance from him of the legal title, which, it was alleged, he had fraudulently obtained, with notice of the complainants' prior equity. Langham and the heirs of Sarah Beard were not made defendants, and for that cause the decree was reversed. There is no distinction in principle between that case and this. In that case this court, in delivering its opinion, holds the following language: "For the appellees it is insisted the proper parties are not before the court, so as to enable the court to decree upon the merits of conflicting claims. And we are all of that opinion." "The complainants can derive no claim in equity to the survey, under or through Langham's executory contract with the Beards, unless these contracts be such as ought to be decreed against them specifically by a court of equity." "How can a court of equity decide that these contracts ought to be specifically decreed, without hearing the parties to them? Such a proceeding would be contrary to the rules which govern courts of equity, and against the principles of natural justice."

This reasoning applies with equal force to the case at bar. Here, however perfect all the other links may be in the chain of the complainant, Belinda's, equitable title to the lot in contest, she can have no claim to it in equity, but through and under the executory contract of Garrison with the Jones's. Garrison has a right to contest the equitable obligation of that contract. No decree can be made for the complainants without first deciding that the contract of Garrison

ought to be specifically decreed. He might insist the purchase-money had not been paid, or make various other defences. It is not true that, if he were made a party, no decree could be made against him. It might not be necessary to require him to do any act; but it would be indispensable to decide against him the validity of his obligation to convey, and overrule such defence as he might make; and if the purchase-money had not been paid, to provide by the decree for its payment, before any decree could be made against the defendants holding the legal title. We are all of opinion that upon this second preliminary objection, the decree of the circuit court must be reversed.

A question of some difficulty presents itself as to the extent of the reversal. The decree of the circuit court directs the defend-
[*247] ants, Ritchie and Vattier, to convey certain portions *of the lot of ground, and awards costs generally against all the defendants. There is no doubt the defendants, against whom there is only a decree for costs, could not appeal alone from the decree of costs. But the defendants below have all appealed together, and although some of them hold the legal title to the lot, yet they all have an interest in defending the title, standing as they do in the relation of vendors, and warrantees, and vendees. Under these circumstances we think the reversal should be general, as to all of the appellants, and the whole case opened. And we are the more inclined to adopt this course, because so numerous and so great have been the irregularities in conducting the cause in the court below, from its commencement to its termination, by decree, that it seems impracticable that justice be done between the parties without sending the cause back as to all the parties, with directions that the complainants have leave, if asked by them, to amend their bill, and make the proper parties; and to proceed *de novo* in the cause, from filing such amended bill.

This cause came on, &c., on consideration whereof it is the opinion of this court that there is error in the proceedings and decree of said circuit court, in this, that Abraham Garrison ought to have been made a party, but was not, before a decree was made between the parties in the cause. Whereupon it is adjudged, decreed, and ordered, that the decree of said circuit court for the district of Ohio, in this cause be and the same is hereby wholly reversed, annulled, and set aside. And it is further ordered, that the cause be remanded to the court from whence it came, with instructions to permit the complainants, upon application for that purpose, to amend their bill, and to make proper parties, and to proceed *de novo* in the cause, from the filing of such amended bill, as law and equity may require.

OLD GRANT, on the Demise of Samuel Meredith, Plaintiff in Error, *v.* JOHN M'KEE, for the Use of the Bank of the Commonweath of Kentucky.

1 P. 248.

Where a recovery of a tract of land was had, in an action of ejectment, and a writ of restitution was awarded of a small portion thereof, of less value than $2,000, this court has not jurisdiction of a writ of error which brings up only the proceedings touching such restitution.

WICKLIFFE moved to dismiss.

MARSHALL, C. J., delivered the opinion of the court.

This is a writ of error to a judgment of the court of the United States for the seventh circuit, and the district of Kentucky, awarding restitution of lot No. 108, in the town of Falmouth, to the defendants in error, who had been turned out of possession by virtue of a writ of *habere facias possessionem*, issued on a judgment in ejectment in favor of the plaintiff in error.

Previous to the institution of the suit, the town of Falmouth had been laid out in pursuance of an act of assembly, and lot No. 108 had been sold and conveyed to George Hendricks. The law establishing the town of Falmouth, directed that the lots should be sold, subject to the condition of making certain improvements thereon, within seven years; on failure to do which, the trustees are empowered to enter on any lot not improved, and sell it again. These improvements were not made on lot No. 108.

The defendant in error moves to quash the writ of error, because the matter in controversy is not of the value of $2,000. The motion is resisted, because the whole property which was recovered in the ejectment may be considered as involved in this motion; since each tenant may move separately for an award of restitution, on the supposition that the regularity of the proceedings, under the law by which the town was *established and the lots sold, may be exam- [*249] ined. On this motion, the plaintiff in error has brought that subject into view, and has discussed it fully. But the court is of opinion that the question of title cannot be considered on this writ of error. The town of Falmouth was separated from the tract out of which it was taken, and this lot was sold before the suit was instituted; neither the trustees of the town nor the proprietors of the lot were parties to that ejectment. The motion to award restitution, therefore, involved nothing further than the lot to which the party prayed to be restored; and as that is not of the value of $2,000, the court has no jurisdiction. The writ of error is to be dismissed.

Writ of error dismissed for want of jurisdiction, it not appearing that the value of the premises in this suit is $2,000.

WILLIAM KONIG, who is an Alien, Plaintiff below, *v.* WILLIAM BAYARD, WILLIAM BAYARD, JR., ROBERT BAYARD, AND JACOB LE ROY, Citizens of the State of New York.

1 P. 250.

An acceptor, *supra* protest, for the honor of the indorser, may, on payment of the bill, recover of the indorser, though he accepted at the instance of the drawee, and as his agent, provided the indorser is not damnified by this indirect mode of proceeding on the part of the drawee.

THE case is stated in the opinion of the court.

Webster and *Hoffman*, for the plaintiffs.

D. B. Ogden and *Oakley*, contrà.

MARSHALL, C. J., delivered the opinion of the court.

[*261] *This suit was brought in the court of the United States for the second circuit and district of New York, on a bill of exchange, drawn by John C. Delprat, of Baltimore, on Messrs. N. and J. and R. Van Staphorst, of Amsterdam, in favor of Le Roy, Bayard, and Co., of New York, and indorsed by them. The bill was regularly presented and protested, after which it was accepted and paid by the plaintiff, for the honor of the defendants. The jury found a verdict for the plaintiff, subject to the opinion of the court, on a case stated by the parties. The judges of the circuit court were divided in opinion on the following points:—

1. Whether the letters offered in evidence by the defendants, and objected to, ought to have been admitted.

2. Whether the plaintiff had a right, under the circumstances, to accept and pay the bill in question, under protest, for the honor of the defendants, and is entitled to recover the amount, with charges and interest.

The first question is understood to be waived. It is a question which was decided by the court at the trial, and could not arise after verdict, unless a motion had been made for a new trial.

The second requires an examination of the case stated by counsel. The bill was transmitted by Le Roy, Bayard, and Co., to Messrs. Rougemont and Behrends, of London, to have it presented for acceptance, who inclosed it to the plaintiff in a letter, from which the following is an extract: "We beg you to have the inclosed accepted; 1st, of fl. 21,500, 60 days, on N. and J. and R. Van Staphorst, and hold the same to the disposal of 2d, 3d, and 4th. You will oblige me by mentioning the day of acceptance, and in case of refusal, you will have the bill protested."

The plaintiff gave immediate notice of the dishonor of the bill, and of their intervention for the honor of the defendants.

Messrs. N. and J. and R. Van Staphorst addressed a letter to the defendants, dated the 26th of November, 1822, giving notice that the bill was dishonored, the drawer having no right *to [* 262] draw, and that they were advised by counsel not to interpose in their own names for the honor of the defendants. The letter adds: "In this predicament, we applied to our friends, William Konig and Co., who had the said bill in hand, informed them of the whole case, and requested these gentlemen, under our guarantee, to intervene on behalf of your signature, with acceptance and payment of the above bill; which favor these gentlemen have not refused to us; so that, without our prejudice, and completely without yours, we have duly protected your interest."

The defendants also gave in evidence a letter from the plaintiff, stating that he had intervened, at the request of N. and J. and R. Van Staphorst, and under their guarantee; but that they required him to proceed against the defendants, as preliminary to the performance of that guarantee.

It was admitted that the bill was drawn by J. C. Delprat, on his own account, and not on any shipment for a debt due from him to the defendants, for advances previously made to him; and that he had given to the defendants an order on N. and J. and R. Van Staphorst, for all balances due from them to him.

It is not alleged that the drawees had any funds of the drawer in their hands.

The plaintiff in this case must be considered as the agent of N. and J. and R. Van Staphorst, and as having paid the bill at their instance. All parties concur in stating this fact. The Van Staphorsts adopted this circuitous course, instead of interposing directly in their own names, under the advice of counsel. They, however, immediately stated the transaction in its genuine colors, to the defendants. It is impossible to doubt that a person may thus intervene, through an agent, if it be his will to do so. The suspicion which might be excited by proceeding, unnecessarily, in this circuitous manner, cannot affect a transaction, which was immediately communicated, with all its circumstances, to the persons in whose behalf the intervention had been made; unless those persons were exposed to some inconvenience, to which they would not have been exposed had the interposition been direct. This is not the case in the present instance, since it cannot be doubted that the defendants might have availed themselves of every defence in this action of which they could have availed themselves had N. and J. and R. Van Staphorst been plain-

tiffs. The case shows plainly that the bill was not drawn on funds, and that the drawees were not bound to accept or pay it. No reason, therefore, can be assigned why the person who has made himself the holder of the bill, by accepting and paying it under protest, should not recover its amount from the drawer and indorsers.

[*263] *This cause came on to be heard on a certificate of division of opinion of the judges of the circuit court of the United States for the southern district of New York, and on the points on which the said judges were divided in opinion, and was argued by counsel; on consideration whereof this court is of opinion that the plaintiff had a right, under the circumstances, to accept and pay the bill in question, under protest, for the honor of the defendants, and is entitled to recover the amount, with charges and interest; which is ordered to be certified to the said circuit court.

GERRIT SCHIMMELPENNICH and JAN ADRIAN TOE LEAR, who are Aliens, *v.* WILLIAM BAYARD, WILLIAM BAYARD, JUN., ROBERT BAYARD, and JACOB LE ROY, Citizens of the State of New York.

1 P. 264.

The case of Cooledge *et al. v.* Payson, (2 W. 66,) reviewed, and the rule confirmed, that a promise to accept, to amount to an acceptance, can be by a letter written within a reasonable time before or after the date of the bill, describing it in terms not to be mistaken, promising to accept it, and shown to the person who afterwards takes the bill on the credit of the letter.

If drawees were bound in good faith to accept, they cannot assume the position of acceptors *supra* protest, for the honor of an indorser.

Where an agent was authorized to make advances on consignments to the extent of two thirds the invoice price, and draw on his principal therefor, it was held that the authority did not extend to consignments made by himself.

Though one dealing with an agent is generally bound to know the extent of his powers, yet if the principal has by his acts or declarations authorized a third person to believe that the agent has power to draw, and such third person has taken the agent's bills, the principal cannot accept them for the honor of such third person.

If a drawee has been in the habit of receiving consignments from the drawer, and has an open account with him, he is not bound to accept a bill, though in fact drawn against a particular shipment, if the letter of advice merely directed him to charge the bill in account, and the state of the account was such that the drawee had no funds of the drawer.

THE case is stated in the opinion of the court.

Ogden and *Oakley*, for the plaintiffs.

Webster and *Hoffman*, contrà.

[*274] *MARSHALL, C. J., delivered the opinion of the court. This action was brought on nine bills of exchange, drawn

by John C. Delprat, on the plaintiffs, and indorsed by the defendants, a list of which follows:—

Baltimore, May 23, 1822,	£500	favor of J. P. Kraft.
" " 27 "	200	favor of defendants.
" " " "	300	"
" " " "	500	"
" June 12 "	1,000	"
" " 18 "	300	"
" July 31 "	1,000	"
" " " "	fr. 10,000	"
" " " "	5,000	"

These bills were regularly protested for non-acceptance and non-payment; but were accepted and paid, *supra* protest, by the drawees, for the honor of the defendants the indorsers. The jury found a verdict for the plaintiffs, subject to the opinion of the court, on a case stated. The judges were divided in opinion on the following points, which have been certified to this court.

1. Whether the authority to John C. Delprat to draw on the plaintiffs, did or did not amount to an acceptance of the bills.

2. Whether the bills paid by the plaintiffs, *supra* protest, for the honor of the defendants, were drawn and negotiated in conformity to the authority and instructions of the plaintiffs to J. C. Delprat.

3. Whether the plaintiffs were bound to accept and pay the bills in question, and whether the same having been paid by the plaintiffs, *supra* protest, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants.

4. Whether J. C. Delprat was a competent witness.

5. Whether the letter offered by the plaintiffs in evidence, and rejected, ought to have been admitted.

6. Whether the plaintiffs are entitled to a judgment on the verdict of the jury.

These questions require an examination of the relations which existed between the drawer of these bills and the drawees.

On the 11th January, 1818, the plaintiffs entered into a contract with John C. Delprat, of which the following is a copy.

The undersigned, N. and J. and R. Van Staphorst, merchants in this city, and John C. Delprat, of Philadelphia, present the *last, choosing for the present act his *domicilium citandi et* [*275] *exequendi*, at the office of the youngest notary here, have

entered with one another into the following arrangement and stipulations:—

ARTICLE I. The second undersigned (namely, J. C. Delprat) shall, to the benefit of the first undersigned (N. and J. and R. V. S.) manage in the United States of America, the mercantile interest of said first undersigned, consisting chiefly in the forming of new solid connections, and procuring of consignments; and shall further perform everything the first undersigned will appoint him to do as their agent.

ART. II. The second undersigned binds himself to procure to no person or persons in this kingdom any consignments or commissions from himself or any other, except to the first undersigned; but on the contrary, to use his utmost exertions towards the benefit of the mercantile house of the first undersigned, they being willing on their side to facilitate all such commercial operations as might benefit the second undersigned without their prejudice.

ART. III. The first undersigned allows to the second undersigned the faculty to value on them direct, or payable in London, at no shorter date than sixty days' sight, for such moneys as the second undersigned shall employ to make advances on whole or part of cargoes of current articles, namely, to the amount of two thirds of the invoice price of articles laden in chartered vessels, and of three fourths in vessels owning to the shippers, and likewise consigned to the first undersigned; it being left to the knowledge and prudence of the second undersigned to judge of the invoice price of the aforementioned goods; and it being understood that the second undersigned, at the same time that he gives advice of his drafts furnished in the above manner, shall inclose and forward, or cause to be inclosed and forwarded, to the first undersigned, the bill of lading and invoice of the goods on which the above-mentioned advances might have been made; and shall cause the above goods to be duly insured in America to that effect, that the policy of said insurance be delivered up, duly indorsed, to the second undersigned, and rests with him until the end of the expedition. It being further a fixed rule that the first undersigned must never come in the predicament of having made any advances on cargoes or part of cargoes which are not duly insured in America.

The first undersigned further oblige themselves to open a credit of $40,000, say forty thousand dollars, with Messrs. Le Roy, Bayard, and Co., New York, to be made use of by the second undersigned, in case any advances are required on consignments to be
[* 276] made to the said first undersigned, that credit to be * renewed every time by the said first undersigned, after the

arrivement of the consigned goods shall have been duly advised by them.

If, however, against all probability, it happened that the multiplicity of consignments rendered it desirable to the first undersigned to stop for a while further consignments, then the said first undersigned retain the faculty to prescribe to the second undersigned such limits and orders as they shall find proper, according to circumstances, which orders and limits the second undersigned shall be obliged to follow.

ART. IV. As sometimes an opportunity might offer to procure a good consignment to the first undersigned, on condition of their taking an interest in that expedition, they authorize the second undersigned to make use likewise of the above-mentioned credit of $40,000 to interest the first undersigned; in such expeditions for a proportion not larger than one fourth, with this restriction, that said proportion must never exceed the amount of $10,000, say ten thousand dollars. The choice of the articles to be shipped to the first undersigned on their own account, being left to the commercial knowledge of the second undersigned. This authorization will be considered as renewed after the termination of each expedition, namely, after that termination shall have been duly advised to the second undersigned by the first undersigned.

ART. V. That the first undersigned, in consideration of the services to be rendered by the second undersigned, shall grant to the second undersigned one-third of the amount of the two per cent. commission, to be earned by the first undersigned on the consignments to be procured, and further, one per cent. from the purchase of such goods which might be shipped for the account of the first undersigned, as is more amply specified in article 4; it is to be understood that then no benefit arises from the third of the two per cent. commission of those goods; and finally, that the second undersigned is promised an allowance for travelling and other expenses the sum of $2,000, say two thousand dollars, per annum, to commence with the 1st of February 1818.

ART. VI. These arrangements shall last for the term of two consecutive years, and thus end with the last day of January, 1820. It being understood that (in case of no denunciation to the contrary, made by any of the parties aforesaid,) this contract will be continued from year to year, but that, in case one of the parties should desire the annullation of the present contract, said party shall be obliged to signify his intention to the other party four months before the expiration thereof.

ART. VII. Ultimately, it has been stipulated that in the unhoped

for and wholly unexpected case of any differences taking place between the undersigned, respecting the fulfilment of any [*277] *of the articles above mentioned, those disputes or differences shall be entirely adjusted and decided by the decision of two arbiters, to be chosen in the city of Amsterdam, one by each party; who, in case of difference of opinion between them, shall have the faculty of appointing a third or super arbiter, which arbiters then must decide and finally terminate all such differences; both parties renunciating to all law measure and impediments, and especially to the faculty of laying any arrests or hindrance on moneys, goods, or possessions, belonging to any one of the parties undersigned; all such aforesaid measures to be considered now and then as null, void, and of no effect whatsoever; the consequences thereof to be suffered by the party which might have made use of the aforesaid measures.

Of the present act have been made two copies, &c.

Amsterdam, 11*th January*, 1818.

(Signed) N. and J. and R. Van Staphorst.
John C. Delprat.

A copy of this contract was transmitted by the plaintiffs to the defendants, in a letter dated the 21st of the same month, a copy of which follows:—

Messrs. Le Roy, Bayard, and Co., New York, (confidential.)

Amsterdam, 21*st January*, 1818.

Gentlemen: Thinking it useful for the extension of our commercial relations in the line of consignments, (one of the branches of our establishment,) to appoint an agent to that purpose in the United States of America, we have been decided by the confidence we place in the character and commercial notions of Mr. John C. Delprat, to appoint that gentleman to the aforementioned trusts; in which choice we have chiefly been directed by the reliance we have on the principles of loyalty and prudence, which must actuate a person employed during such a long period by your worthy house. We judged it necessary, for the obtaining of said purpose, to leave at the disposal of Mr. Delprat sufficient means to facilitate his exertions, namely, by opening with you, in his favor, a credit to be made use of by him in the manner pointed out in the inclosed abstract of our contract with said gentleman. We therefore request, and authorize you to furnish Mr. Delprat to the extent of $40,000, say forty thousand dollars, (to be made advances with by him on such cargoes, or part thereof, as he might procure the consignment of to our house, and to be made use of to interest our

house in part of cargoes to the forementioned purpose.) The credit to run for the space of two years, unless countermanded by us in such a manner that, when Mr. Delprat has availed himself of the whole or part of said credit of $40,000, that credit, or part of the same, must be considered renewed when you receive our approbation of the said disposition of Mr. Delprat.

"You will observe, the sole object of the mission of Mr. [* 278] Delprat is to obtain solid consignments from good houses, throughout the United States, and the disposal of the credit opened in his behalf with your house is exclusively intended to facilitate said business. In this important matter, it will be a point of great security, and, as such, eminently satisfactory to us, that our said agent may be able to have recourse, in every circumstance, to wise and friendly counsel; and we therefore request you to assist Mr. Delprat, as far as opportunity may offer, with the lessons of your long experience, particularly with respect to those transactions for which, by virtue of the credit aforementioned, we may have recourse to your cash, it being, as you will observe, a material point that we are secured; that the moneys he may dispose of will have no other than the destination just mentioned. To this effect, we authorize you, gentlemen, in case of moral certainty that the moneys Mr. Delprat should demand from you by virtue of the above-mentioned credit would not be employed in the aforementioned manner, and earnestly request you not to pay, and to refuse him, any moneys whatsoever, on account of the above credit.

In general, as a trust of this nature, which is to have its effect at such a distance, is always a delicate matter, we must claim and dare expect from your known sentiments towards us, that you will give the strictest attention to the line of conduct followed by Mr. Delprat; and if, unexpectedly, that conduct could appear in the least exceptionable, we mean either imprudent or equivocal, then, gentlemen, do give us, with all the frankness of long experienced friendship, your ideas respecting that subject, and be perfectly secure that every information, of what nature soever, will not only be thankfully acknowledged by us, but received with the most religious secrecy. We have now, gentlemen, only to request your kind offices in favor of Mr. Delprat, and to solicit your friendly cooperation towards the attaining the object of his mission, which, we are fully persuaded, can be much facilitated by your kind recommendation to the numerous friends you have in different parts of your country. Be assured, gentlemen, of the high sense we have of the obligation we will have to you for your friendly services through the whole of the business we just now took the liberty to explain to you, and of the earnest

desire we have to be often in the opportunity of rendering you the like, or any services in our power. Referring for commercial information to our general letter of this date, we are, with sincere regard,

Gentlemen, your most obedient servants,

N. and J. and R. Van Staphorst.

(Indorsed,) Confidential, Amsterdam, 21st of January, 1818. N. and J. and R. Van Staphorst. Received, March 29th. Answered, 24th do.

[* 279] * This letter was answered by Le Roy, Bayard, and Co. in the following terms: —

PRIVATE.

New York, 24th of March, 1818.

Messrs. N. and J. and R. Van Staphorst, Amsterdam.

Gentlemen: We have the honor of replying to your esteemed favor of 21st of January, acquainting us with the arrangement you have made with our mutual friend, Mr. Delprat, who has undertaken the agency of procuring you consignments from this country. In the furtherance of the object, we shall be very happy to render our services useful, and beg to offer our best wishes for the success of Mr. Delprat's operations in your behalf. Due note is taken of the credit you are pleased to open to that gentleman with us, to the amount of $40,000, subject to renewal, as fully expressed in your letter. We doubt not, from the knowledge we possess of Mr. Delprat's character, that he will fully justify the confidence you repose in him; and though he may, under existing circumstances, find it difficult to enlarge to the extent that could be mutually wished, we are persuaded that no exertion will be wanted on Mr. Delprat's part, to reap the utmost benefit from the mission intrusted to him.

Believe us, with honor and esteem, gentlemen,

Your obedient servants,

Le Roy, Bayard, and Co.

It is proper to observe that several merchants of Holland, whose agents the plaintiffs were, had become large holders of government stock, and of shares in the Bank of the United States. Le Roy, Bayard, and Co. had been employed to draw the interest and dividends, and to remit them to Europe. The credit of $40,000, therefore, which was raised for Delprat, with Le Roy, Bayard, and Co., was merely the application of so much of their funds, in the United States, to the business of his agency, in aid of the bills he was authorized to draw on them. The continuance or discontinuance of this credit might depend on the eligibility of continuing this mode

of remittance, as well as on the withdrawal of their confidence in their agent. Several letters passed between the plaintiffs and defendants, respecting their transactions in consequence of this credit, which manifest, unequivocally, the desire of the plaintiffs that its amount should not be exceeded, but which betray no want of confidence in Delprat. In a letter of the 24th June, 1819, they renew the credit of $40,000, and add, "at the same time, we confirm our former orders not to exceed said amount for our account. In case you have funds in hand, for any of our institutions, and you think proper to remit us for the same Mr. Delprat's bills on us, the nature of which you are well acquainted with; you allow him, then, the same credit *which you do to all persons from [*280] whom you take bills, in the persuasion of their solidity and of the reality of the transaction on which the bills are issued.

In answer to this letter, the defendants say, on the 24th of September, 1819: "You also accord us the permission to remit this gentleman's (Delprat's) drafts for any moneys we may have on hand belonging to your various institutions. The confidence which we mutually have in this gentleman's character, must, with us, act in lieu of vouchers, to exhibit the reality of transactions which may give origin to such drafts, the whole of this gentleman's operations having been hitherto beyond our immediate knowledge."

This correspondence continued until the 12th of May, 1820, when N. and J. and R. Van Staphorst addressed a letter to Messrs. Le Roy, Bayard, and Co., of which the following is an extract:—

"There being frequent opportunities of drawing here now, on New York, we will probably have, for some time to come, occasion to dispose of the dividends which 'you will receive for our account, in October next,' and so on; and we have therefore directed Mr. Delprat not to make use of his credit of $40,000, lately opened in his favor. We thus also request you, by the present, to consider the same as annulled until we may again renew the same."

The agency of Delprat continued after this revocation of his credit with Le Roy, Bayard, and Co. He continued to solicit consignments for their house in Amsterdam, and to draw bills on them for advances, without any other alteration in his powers than is contained in a letter of the 6th February, 1821, which contains the following clause: "The advances, therefore, to be made by you on our behalf, on shipments to our consignments, either from funds belonging to us in your hands, or by drawing and indorsing the shipper's draft, must not exceed, henceforth, one half of the 'true invoice.'" As a compensation for this reduction of the advance to be made in the United States, J. and N. and R. Van Staphorst engaged, on the ar-

rival of the shipments, to remit to the consignors the estimated value of the cargoes in bills on their house in the United States.

Delprat acknowledged the receipt of this letter on the 17th of April, 1821, and promised to conform to its directions.

The correspondence between the plaintiffs and defendants, respecting Mr. Delprat's agency, appears to have ceased on the 12th of May, 1820, when his credit with the house of the latter was annulled. At least, no subsequent letter appears in the record until the 9th of July, 1822, when the plaintiffs announced to the defendants the sudden termination of their connection with Mr. Delprat; whose conduct, they said, had been so imprudent as to [* 281] oblige them, at the same time, to protest several * of his drafts. Their knowledge, they say, of the former intercourse between Le Roy, Bayard, and Co. and Mr. Delprat, and of the great regard felt for him by those gentlemen, induce them to state the chief reasons which compelled them to this measure. These are, his irregularities in keeping his accounts, and omission to furnish an account since the 31st of December, 1820, although the balance then due from him was fully $7,837.54, being "for the proceeds of gin consigned by us to him; for proceeds of drafts, issued by him on us, for our account, in order to employ the proceeds to make prudent advances with," &c.

They then proceed to state that Mr. Delprat owed, at that date, upwards of 82,000 florins, against which he might be entitled to a credit of $6,000. The account, they say, has accrued to this height, in a great measure, "in consequence of shipments made to him for his account, in full confidence of his making us, for the amount, remittances; which we till now have not received, though the goods were with him for many months." The letter complains of the large advances made by Mr. Delprat, on consignments, notwithstanding their repeated remonstrances; and dwells on the high opinion they had entertained of him; "his integrity," they say, they "even now will not question." Thus, the letter proceeds, "were matters situated, when last Friday, contrary to anything we could expect or anticipate, we found ourselves drawn upon by Mr. Delprat, for £200, £300, and £500, issued, as he informs us, for the amount of purchases which he is making of articles not yet shipped;" and, on the other hand, 2d, £500, florins 1250 and 1750, issued on us, as advances made to Mr. Krafft, already so much our debtor, on shipments which he made some long time ago, and which Mr. Delprat could clearly perceive that, taken at an average, did nothing diminish the balance due by him."

The letter proceeds to state, in substance, that they could choose

only between the alternatives of allowing the debt due from Mr. Delprat to be swelled to a still larger amount, and protesting his bills. They had chosen the latter, however it might pain their feelings. They express their regret to find that, among the drafts to be protested for non-acceptance, and perhaps afterwards for non-payment, are several indorsed by the defendants, for whose honor, however, they had intervened.

This letter was received by the defendants on the 1st day of September, 1822. They immediately obtained from Mr. Delprat an order on the plaintiffs to hold at their disposal all the proceeds of the goods shipped in his name, by The Virgin and other vessels, and all balances due to him. This order was inclosed to the *plaintiffs, in a letter of the 7th September, 1822, in which [*282] they say: "We can of course only consider this order as applying to the balance that may possibly accrue to him upon the settlement of your account; and if any should accrue, we will thank you to take such legal steps which you may deem necessary, as will place it with us, without fear of contention. His drafts, which you may have paid for our account, will probably furnish sufficient authority to enable you to do so."

At the trial, John C. Delprat was examined as a witness. He deposes that the several bills of exchange on which this suit was instituted, were drawn in his capacity as agent, on account of and for the purpose of making advances on shipments consigned to the plaintiffs; and, except that in favor of J. P. Krafft, for £500, were accompanied by letters of advice. That during the whole period of his agency, he was in the habit of making shipments on his own account, and of drawing for advances on the said shipments precisely in the same manner as when they were made by others; that this was done with the full knowledge and approbation of the said N. and J. and R. Van Staphorst, who never found fault with him for doing so; but to encourage him to make such shipments, gave him credit for one half the commission upon the sales of the shipments so made upon his own account. On his cross-examination, the witness stated that the bill for £500 in favor of Krafft, was drawn for shipments, by The Edward, Jason, and May Flower. He cannot say when The Edward sailed. The Jason had arrived, and The May Flower had sailed before the bill was drawn. Krafft was at that time indebted to the plaintiffs. The bill was issued to Krafft, but was returned to witness, who sent it to the defendants. The bills of lading and the invoices were not sent with it. The three bills of the 27th of May, for £1,000, were drawn on account of shipments, in his own name, by The Virgin. She sailed about the 30th July

They were not accompanied by invoices or bills of lading. The two bills of the 12th and 18th June, for £1,000 and for £300, were drawn on tobacco shipped by the Henry, belonging to the witness and to Mr. Krafft. The bill of lading and invoice did not accompany them. The three bills of the 31st of July were drawn on the shipments by the Virgin generally. They were not accompanied by bills of lading or invoices. The defendants received a commission for indorsing his bills on the plaintiffs.

In making the advances on shipments on his own account, he drew on the plaintiffs, sent his bills to the defendants, to whom they were charged, and then drew on the defendants, as the money was required, either on his own shipments or the shipments of
[*283] others; which bills were credited to the defendants. *He understands that all his transactions with the defendants were carried by them into their general account with him. These transactions were not confined to his agency for the plaintiffs. He remains considerably indebted to them.

He was concerned in shipments with Mr. Krafft, and did a great deal of business with him; but did not consider himself as a general partner.

The connection between the plaintiffs and J. C. Delprat, was formed by the agreement of the 11th January, 1818. He was constituted their agent for purposes therein described, and received such powers as were deemed sufficient to enable him to perform the duties which devolved on him. That duty was to manage their mercantile interest in the United States, "consisting chiefly in the forming of new solid connections, and procuring of consignments." To enable him to perform this duty, he was allowed the faculty to value on them direct or payable in London, at no shorter date than sixty days' sight, for such moneys as he should "employ to make advances on the whole or part of cargoes of current articles;" namely, to the amount of two-thirds of the invoice price, &c. It being understood that his letters of advice should be accompanied by the bills of lading and invoices of the goods on which the advances may have been made.

John C. Delprat, then, had no general authority to personate the plaintiffs in all respects whatever; but was an agent appointed for particular purposes, with limited powers, calculated to subserve those purposes. To procure consignments, it was indispensable that he should advance money to the consignors, and this money was to be raised by bills on the plaintiffs. But he was authorized to draw only for a special purpose, and to a limited extent. Out of the limits assigned to him, he had no power. The plaintiffs not being, as a matter of course, the acceptors of every bill he might draw, must

have performed some act in relation to the particular bills, which imposes on them in law the character of acceptors.

This point was considered by this court, in the case of Cooledge and others *v.* Payson and others, 2 W. 66.

Cooledge and Co. held the proceeds of a cargo, claimed by Cornthwaite and Cary, whose claim depended on the decision of this court, of a case depending therein. Cornthwaite and Cary were desirous of drawing these funds out of the hands of Cooledge and Co., and offered a bond, with sureties, as an indemnity, in the event of an unfavorable decision. Cooledge and Co. in a letter to Cornthwaite and Cary, state some formal objections to the bond, and add, "we shall write to our friend Williams, by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. Williams * feels satisfied on this point, he will inform [* 284] you; and in that case, your draft for $2,000 will be honored."

In answer to the letter addressed by Cooledge and Co. to Williams, on this subject, he declared his satisfaction with the bond, as to form; declared his confidence that the last signer was able to meet the whole amount himself; but that he could not speak certainly of the principals, not being well acquainted with their resources. He added, "under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given."

On the same day, Cornthwaite and Cary called on Williams, who stated the substance of the letter he had written, and read a part of it. One of the firm of Payson and Co. also called on him, and received the same information. Two days afterwards Cornthwaite and Cary drew on Cooledge and Co. for $2,000, and paid the bill to Payson and Co., who presented it to Cooledge and Co., by whom it was protested. Payson and Co. sued them as acceptors.

The court instructed the jury that if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Cooledge and Co. to Cornthwaite and Cary, did declare that he was satisfied with the bond referred to in that letter; and that the plaintiffs on the faith and credit of the said declaration, and also of the letter to Cornthwaite and Cary, did receive and take the bill in the declaration, they were entitled to recover in the action.

The jury found a verdict for the plaintiffs; the judgment on which was affirmed in this court.

In this case, the drawee had written a letter to the drawer, promising to honor his bill for $2,000, if Mr. Williams should be satisfied with a bond of indemnity, which had been placed in their possession. Mr. Williams declared his satisfaction with it, both to the drawer

and holder of the bill, within two days after this declaration. In this case the promise to accept was express, and applied to a particular bill, the precise amount of which was specified in the promise.

The court in its opinion reviews several decisions in England on this point; in all of which the promise to accept was express; and in some of which the court declared the opinion that the promise ought to be accompanied by circumstances which may induce a third person to take the bill. After reviewing these cases, this court laid down the rule, "that a letter written within a reasonable time before or after the date of the bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise."

[* 285] * It cannot be alleged that these bills are brought within this rule. The plaintiffs, therefore, cannot be considered as acceptors of them.

But, although the plaintiffs cannot be viewed as the acceptors of these bills, it does not follow, necessarily, that they can maintain the present action. To entitle them to maintain it, the court must be satisfied that the payment is, in fact, what it professes to be, — a payment really for the honor of the indorsees. If the drawees, thus refusing to honor the bill, and thus denying the authority of the drawer to draw upon them, were bound, in good faith, to accept or pay as drawees, they will not be permitted to change the relation in which they stand to the parties on the bills by a wrongful act. They can acquire no rights, as the holders of bills paid *supra protest*, if they were bound to honor them in their character of drawees. The single and unmixed inquiry, therefore, on the second and third questions is, whether the drawees were bound to accept or to pay these bills. And, first, were they so bound because the bills were drawn in pursuance of the authority they had given to the drawer? This demands a more critical examination of the evidence than was required when considering the first question.

It is apparent, from the contract of the 11th of January, 1818, that Mr. Delprat came to the United States as the agent of N. and J. and R. Van Staphorst, to manage their mercantile interest; "consisting chiefly in forming new solid connections and procuring of consignments;" and also with commercial views of his own. The principal object of the contract is to define his authority, and to regulate his conduct as agent. He is allowed to draw on the plaintiffs for such moneys as he should employ, in making advances on current articles consigned to his principals, to the amount of two thirds of the invoice price of articles laden in chartered vessels. He was still

further restricted in his advances, by orders received long before the bills in question were drawn, to one half of the true invoice. Mr. Delprat's authority, then, to make advances was limited, at the date of this transaction, to one half the invoice price. One, and perhaps the most usual mode of conducting business of this description is, to draw in favor of the consignor, or to indorse his bill. The agent might, however, if not otherwise instructed, draw immediately on his principal, and advance the money to the consignor which was raised by the bill. In either case, however, drafts beyond one half the invoice price of the consignments actually made would exceed the authority given. Circumstances may exist, which would impose on the principal the obligation to pay such drafts; but the question we are now considering relates only to the authority under which the bills were drawn. That authority restricted * the [* 286] agent in the amount of his drafts to one half the invoice price of the articles actually consigned; and also required him to accompany his letters of advice with bills of lading and invoices.

Were the bills in question drawn in conformity with powers and instructions thus limited?

The first bill on the list is for £500, drawn in favor of J. P. Krafft, on the 23d of May, 1822, and indorsed by him to the defendants. The letter of advice states this bill to be drawn on account of shipments by The Edward, Jason, and May Flower, as by letter of 21st, which is to be charged to account of P. Krafft. The letter of the 21st is not in the record.

The shipment by The Jason had arrived, and The May Flower had sailed before the bill was drawn. Mr. Krafft was at the time indebted to N. and J. and R. Van Staphorst. The bill was returned by Krafft to Delprat, and then indorsed by the defendants.

It does not appear certainly who remitted this bill; although the probability is that, as it was indorsed by the defendants, not as purchasers but for a commission, it was remitted by Delprat, to whom it was returned by Krafft, as is stated in Delprat's testimony, or by some person to whom Delprat sold it. It is true that he further states that, after the bill was so returned, he sent it to the defendants; but this was, no doubt, done for the purpose of having it indorsed by the defendants, in order to give it credit. Neither does it appear, from the evidence in the cause, that Krafft accompanied the shipments on account of which this bill was drawn, by any letter of advice, or otherwise directing the proceeds thereof to be applied to the discharge of this bill; but, on the contrary, the letter of advice addressed to the plaintiffs by Delprat directed the bill to be charged to the account of Krafft, generally. Under these circumstances, taken

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in connection with the additional one that Delprat was concerned, generally, with Krafft, in the shipments made to the plaintiffs, the court is of opinion that there is no material difference between this bill and those drawn on account of shipments made by and in the name of Delprat, which are now to be considered.

It has already been stated that Mr. Delprat was a merchant, trading on his own account, at the same time that he was the agent of N. and J. and R. Van Staphorst. His transactions, in his two characters, were as distinct from each other as if they had been the transactions of distinct persons. As an agent, he was bound to act "in conformity to the authority and instructions" of his principals. As a merchant, he was himself the principal, and acted in conformity with his own judgment. It would seem, then, that the [* 287] contract must contain some very peculiar * and unusual provisions, to place Mr. Delprat under the authority of the house in Amsterdam, whilst carrying on trade in the United States on his own account. Upon reference to the contract, we find a stipulation between the parties in the following words: "The second undersigned (Delprat) binds himself to procure to no person or persons in this kingdom any consignments or commissions, from himself or any other, except to the first undersigned; but, on the contrary, to use his utmost exertions toward the benefit of the mercantile house of the first undersigned; they being willing, on their side, to facilitate all such commercial operations as might benefit the second undersigned, without their prejudice."

This article contains the only limitation on the entire independence of Mr. Delprat as a merchant. It is, perhaps, a necessary limitation, which was, in part, the price of his agency, and for which he finds a compensation in the profits of the business confided to him. This restriction does not change the character of his transactions as a merchant. His waiving the right to consign to any other house, does not impress on his consignments to the Van Staphorsts, or on his bills drawn on those consignments, a character different from that which would have belonged to them had his shipments been made from choice. He does not bind himself to make consignments to them; but not to make consignments to any other house in the Netherlands.

If any doubt could arise from this article, it would be produced by the peculiar manner in which it is expressed. Mr. Delprat binds himself to procure to no person in the kingdom of the Netherlands any consignments or commissions, from himself or any other, except to the Van Staphorsts. The singular application of the word "procure," to consignments made by Mr. Delprat himself, may be

connected with the succeeding article, which authorizes him to draw bills, and may have some influence on its construction. In that article, the Van Staphorsts allow Mr. Delprat "the faculty to value on them direct, or payable in London," for such moneys as he shall employ to make advances on the whole or part of cargoes of current articles consigned to them, to the amount of two thirds of the invoice price.

It may be said that, as in the preceding article, consignments made by Delprat on his own account were considered as procured by him, and were placed on the same footing with consignments made by others; so in this the express authority to draw bills might embrace transactions of both descriptions. But we do not think that the inaccurate use of words in one article will justify a departure from the correct construction of a succeeding article; unless the same words are used, or the *bearing of the one [*288] on the other is such as to require that departure.

The same motives existed for restraining the agent from making as from procuring consignments to any other house in the Netherlands. His utmost exertions were required for the benefit of his principals. The restriction, therefore, might be expressed in the same sentence; and a slight inaccuracy of language was the less to be regarded, because it could produce no possible misunderstanding with respect to the extent of the prohibition.

The third article might not be intended to prescribe the same rules for the conduct of Mr. Delprat, as a merchant and as the agent of the Van Staphorsts. As a merchant, he had a right to draw on effects placed in their hands, independent of contract. The usage of trade allows such drafts to be made on a shipment; and the consignee must pay the bills, if the shipment places funds in his hands to pay them. But, as agent, his line of conduct was to be prescribed by contract. We must, therefore, consult the language of the agreement, in order to determine whether it provides for the future connection between the parties, further than as regards their characters as principal and agent.

The faculty given to Mr. Delprat by the third article, to value on the Van Staphorsts, is "for such moneys as he should employ to make advances" on articles consigned to them. Money laid out in the purchase of articles on his own account cannot, with any propriety of language, be denominated money employed in making advances on articles consigned to him. The distinction between money advanced on articles consigned and money employed in purchases, although the articles may be purchased for the purpose of being consigned, is obvious. Money advanced is always to another.

never to the individual making the advance. This language shows, we think, incontestably, that the article was drawn with a sole view to bills drawn by Mr. Delprat as agent, not on his own account as a merchant.

A subsequent part of the article gives additional support to this construction. Mr. Delprat is to draw for two thirds of the invoice price of the article, and is himself the judge of the price which may be inserted in the invoice. This power might be safely confided to him in making advances to others, but might not be trusted to him in his own case. The case shows the Van Staphorsts to have been men of extreme caution. Their letter to Le Roy, Bayard, and Co., inclosing their contract with Delprat, shows an unwillingness to commit themselves to him further than was necessary. It [* 289] is not probable that they * would have given him an express authority to draw on his own account on invoices to be priced by himself.

But the language of the article applies, we think, entirely to his bills drawn as agent, not to those drawn as a merchant transacting business for himself.

When examined as a witness, Mr. Delprat says that, during the whole period of his agency, he was in the habit of making shipments on his own account, to the said house in Amsterdam, and of drawing for advances on account of the said shipments so made, precisely in the same manner as when the shipments were made by others; and this was done with the full knowledge of N. and J. and R. Van Staphorst, who never found fault with him for doing so; but, in order to encourage him to make such shipments, gave him credit for one half the commission upon the sales of the shipments, so made on his own account.

The Van Staphorsts were commission merchants, desirous of extending their business. No doubt can be entertained of their willingness to receive consignments from Mr. Delprat, as well as from others. But this does not prove that the power given him as their agent, to make advances to others, was intended to regulate the intercourse between them as merchants. That intercourse was regulated by the general principles of mercantile law; and the contract between the parties does not show that either was dissatisfied with those principles, or wished to vary them.

This question refers, we presume, to the authority given by the contract of the 11th of January, 1818. The first article describes the objects which were committed to Mr. Delprat, by the Van Staphorsts. These were: the management "of their mercantile interest in the United States, consisting chiefly in the forming new solid connections, and procuring of consigments."

The second article restrains the right Mr. Delprat might otherwise have exercised, of consigning to other houses in the Netherlands.

The third authorizes him to draw bills on his principals, for the purposes of his agency, under such limitations as they deemed it prudent to prescribe.

This contract, we think, does not contemplate bills drawn by Mr. Delprat on his own account, as a merchant. The bills mentioned in the declaration, which were drawn in favor of the defendants, and indorsed by them, do not come within the authority given by the contract. No instructions from the plaintiffs, extending this authority, appear in the record.

The third question comprehends the whole matter in controversy, and has been partly answered in answering the preceding questions. It asks whether the plaintiffs were bound *to [*290] accept and pay the bills in question; and whether the same having been paid by the plaintiffs, *supra* protest, for the honor of the defendants, the plaintiffs are entitled to recover the amount of the defendants?

The opinion has been already expressed that the bill, drawn on the 23d of May, 1822, for £500 sterling, in favor of J. P. Krafft, is not distinguishable from those which were drawn by Mr. Delprat, to enable him to purchase articles on his own account, which were shipped to the plaintiffs. In making these shipments, and in drawing these bills, Mr. Delprat acted for himself, as an independent merchant. The relation between him and the plaintiffs was that of consignor and consignee. The obligation of the plaintiffs to accept and pay his bills, depended essentially on the state of their accounts. So far as the information furnished by the case goes, Delprat appears to have been indebted to the plaintiffs. In their letters of 19th July and 10th September, 1822, which were given in evidence by the defendants, they state him to be then their debtor; and it is not shown that this debt has been discharged. The plaintiffs, therefore, were not bound to accept and pay these drafts, unless they have acted in such a manner as to give the holders of the bills a right to count on their being paid.

It is believed to be a general rule, that an agent with limited powers cannot bind his principal when he transcends his power. It would seem to follow that a person transacting business with him on the credit of his principal, is bound to know the extent of his authority. Yet, if the principal has, by his declaration or conduct, authorized the opinion that he had given more extensive powers to his agent than were in fact given, he could not be permitted to avail himself of the imposition, and to protest bills, the drawing of which

his conduct had sanctioned. But the defendants, in this cause, cannot allege that they have been deceived. They were the intimate correspondents of the plaintiffs, from whom they received a copy of the contract. The letter which transmitted it, requests their friendly supervision of the conduct of Mr. Delprat, and desires them not to pay the money for which the plaintiffs had given him a credit with them, in case of "a moral certainty" that it would not be employed for the purposes of his agency. In the course of the correspondence between the plaintiffs and defendants, we find several letters, written during the continuance of Mr. Delprat's credit with the latter, which shows the determination of the former not to approve of advances beyond that credit. In their letter of the 24th of June, 1819, the plaintiffs expressly caution the defendants, should they think proper to remit in Mr. Delprat's bills, the nature of which they are [* 291] well acquainted with, that they (the *defendants) allow him the same credit that they do other persons, from whom they take bills, in the persuasion of their solidity, and of the reality of the transaction on which the bills are issued. They add: "This is not the effect of any want of confidence in our agent, but merely profluing from our invariable rule to limit and circumscribe the credits we allow." The letters from the defendants show a perfect understanding, on their part, of the terms on which Mr. Delprat's bills were to be taken. On the 11th May, 1819, announcing that he had filled his credit, they say: "In addition to it, he has expressed an anxiety that we should negotiate his drafts on you, payable in London, for about £3,000 sterling, or that we should take his drafts on Amsterdam, for a similar value. The personal regard which we bear for Mr. Delprat, would have induced us promptly to accede to his request, had not the restriction laid upon us, of not permitting him to exceed, but for a few hundred dollars, the credit you give him, and the total absence of any indication from you of a wish for us to interfere in his pecuniary arrangements, in any other than the mode marked by the credit, led us to believe that our negotiations or purchase of his drafts, was neither wished nor contemplated by you." And, in their letter of the 7th of September, 1822, inclosing the order of Mr. Delprat on the plaintiffs, for any balances belonging to him in their hands, so far from complaining of the protest of the bills, they say: "We can, of course, only consider this order as applying to the balance that may possibly accrue to him, upon the settlement of your account."

Messrs. Le Roy, Bayard, and Co., then, were not deceived by the plaintiffs. Unfortunately for themselves, they placed too much confidence in Mr. Delprat. They took his bills, as they were cautioned

to do, in the letter of the 24th June, 1819, "in the persuasion of their solidity, and of the reality of the transaction on which they were issued." If in this they were mistaken, the responsibility and the loss are their own. The 4th and 5th questions have been waived by the parties, and do not properly arise in the case. They are on exceptions taken in the trial of the cause, which could not be brought before the court after verdict, but on a motion for a new trial, which was not made.

The 6th question, whether a judgment can be rendered on the verdict of the jury, has been answered, so far as this court can answer it. We do not understand it as referring to the amount of the verdict, for, on that the circuit court alone can decide. If it is intended to repeat, in another form, the question whether the plaintiffs can maintain their action, as the holders of bills, ac- [*292] cepted and paid, *supra* protest, for the honor of the drawers, it is already answered.

The decision of a majority of this court, on the points on which the judges of the circuit court were divided, will be certified in conformity with the foregoing opinion.

This cause came on to be heard, on a certificate of division of opinion of the judges of the circuit court of the United States, for the southern district of New York, and on the points on which the said judges were divided in opinion, and was argued by counsel, on consideration whereof, this court is of opinion —

1. That the authority to John C. Delprat to draw on the plaintiffs, did not amount to an acceptance of the bills.

2. and 3. That the bills mentioned in the declaration, were drawn by the said Delprat, not under the authority of the plaintiffs, but on his own account; and the plaintiffs were not bound to accept and pay them, unless funds of the drawer came to their hands.

4. and 5. These questions are understood to be waived, and do not appear to arise in the case.

6. The 6th question is decided by the answer to the 2d and 3d, so far as respects the right of the plaintiffs to maintain their action. On the *quantum* of damages, this court can give no opinion.

All which is ordered to be certified to the court of the United States for the second circuit and district of New York.

4 P. 111; 8 H. 451.

DANIEL PARKER, Plaintiff in Error, v. THE UNITED STATES.

1 P. 293.

Under the act of March 16, 1802, (2 Stats. at Large, 132,) the adjutant and inspector general, while stationed at the seat of government, was not entitled to additional allowances by way of double rations.

ERROR to the circuit court for the District of Columbia.

Jones, for the plaintiff in error.

Wirt, Attorney-General, for the United States, submitted the case.

All the material facts of the case are stated in the opinion of the court, which was delivered by DUVALL, J.

An action was commenced in the circuit court, by the United States, against the plaintiff in error, to recover the sum of $2,337.60, which he had received from Mr. Leslie, the paymaster, then stationed at the seat of government, on a claim for double rations, due him in his capacity of adjutant and inspector-general of the army [*294] of the United States, from the *30th of September, 1818, to the 31st of May, 1821. On the settlement of the account of the paymaster, this item was disallowed by the second auditor, who considered it as wrongfully paid; and the amount was afterwards directed to be charged to the personal account of General Parker.

The office of adjutant and inspector-general of the army, with the rank, pay, and emoluments of a brigadier-general, was created by the Act of March 3, 1813.[1] The plaintiff in error was appointed to that office; and his commission bears date on the 1st of May, 1816, with the rank of brigadier-general from 22d of November, 1814.

The pay and emoluments of the officers of the army are fixed by the act of 16th of March, 1802, and the act of the 12th of April, 1808.[2] By the 5th section of the first-mentioned act, it is provided that the commanding officers of each separate post shall be entitled to such additional number of rations as the President of the United States shall from time to time direct, having respect to the special circumstances of each post. Under this authority, the President has at various times designated military posts and stations, and allowed double rations to the commanding officers; and in the case of General Wilkinson, when stationed at New Orleans, and commanding there in quality of a commanding officer at a separate post, he allowed that officer treble rations. It appears, by the record and documents

[1] 2 Stats. at Large, 819. [2] Ib. 481.

referred to in this case, that on the 25th of August, 1812, the President ordered that generals commanding separate armies should receive double rations.

In February, 1814, an order was issued by the war department, on the subject of double rations, of which the following is an extract: "It is ordered that general or other officers commanding districts shall, while so doing, receive double rations; which will supersede all other grants of double rations at posts within the district."

On the 6th of March, 1816, a general order was issued in the words following: "Generals commanding divisions; officers commanding military departments; and all officers while in the command of permanent posts and garrisons, separate from the stations of commandants of departments, which subject them to the additional expense of independent commands, are allowed double rations. No more than one officer can be entitled to double rations at the same station."

The adjutant and inspector-general performed the duties of his office from November, 1814, and charged the compensation as allowed by law until the year 1816, when a difficulty arose on the subject of his fuel and quarters, from the circumstance of their being no disbursing office in the quartermaster's department at the seat of government; and from the regulations *of the [*295] war department then in force, prohibiting an allowance in money to be made to officers in lieu of these emoluments. The secretary of war then issued the following order: "A commutation of double rations is allowed to the adjutant and inspector-general in lieu of fuel and quarters."

Under this authority he claimed and was allowed double rations from November, 1814, refunding to the government the allowance he had received for fuel and quarters from the time of his acceptance until the date of the above order. He continued to receive double rations, making no charge for fuel and quarters, until an order was issued by the secretary of war, on the 10th of August, 1818, to the following effect: "The reason for the allowance to the chief of the engineers, and to the adjutant and inspector-general, in lieu of fuel and quarters, no longer existing, since the establishment of the quartermaster's department, at the termination of the present quarter such allowance will cease, and the quartermaster-general will, on requisition, furnish them with fuel and quarters, agreeably to their respective ranks." The commutation of double rations ceased accordingly; and the adjutant and inspector-general continued to charge and receive single rations only, from the 1st of October, 1818, to the 31st of May, 1821, when the office was abolished.

The defendant in the court below, now plaintiff in error, in support of his claim, produced a certificate from Richard Cutts, second comptroller of the treasury, "that the senior officer of the engineer department, stationed at Washington, has charged and been allowed double rations since the 1st of January, 1818. The senior officers of the quartermaster's subsistence, and ordnance departments have charged and been allowed double rations, since the 27th of July, 1821; and Major-General Brown has charged and been allowed double rations since the 1st of June, 1821, when he was stationed in this city." And also the following regulations: The regulation and general order of the 27th of July, 1821, issued by the war department, allowing to the quartermaster-general, commissary-general of subsistence, the colonel of engineers, and the chief of the ordnance department, (while stationed at the seat of government,) double rations from the date of the said order.

The regulations or general order, duly issued from the war-department, dated the 31st of May, 1821, addressed to the defendant, as adjutant and inspector-general, directing him, among other things, to hand over the records and files of his office to Major-General Brown, on the next day, being the 1st of June, 1821; the said major-general having, from the time he had assumed command, and had relieved the said adjutant and inspector-general, at the seat [*296] of government, pursuant to the last-mentioned order, been allowed and paid double rations, as certified by the second comptroller; which regulation or general order is in the following words: "The adjutant-general, under the law of the 2d of March last,[1] being attached to the major-general commanding the army, and now absent, you will to-morrow pass over the records and files of your office to Major-General Brown, and will assume the duties of pay-master-general. Major-General Brown has been advised of this order; and Colonel Towson will be instructed to hand over the papers and records of the pay department to you." That the brigadiers-general of the army of the United States have all been regularly allowed double rations since the said general order and regulation of the 6th of March, 1816. That the defendant continued at the head of the department of adjutant and inspector-general, and stationed at the seat of government, from the time of his appointment and commission as such until the 31st of May, 1821, and until he was relieved by Major-General Brown as before mentioned.

The defendant then proved, by Thomas S. Jessup, quartermaster-general, that in his opinion, and according to the general usage of the army, the department of adjutant and inspector-general was a

[1] 3 Stats. at Large, 615.

military department; and that the defendant, whilst exercising that office, was commandant of a military department; and, as such, was subject to the additional expense of an independent command.

The declaration in this cause is founded on a transcript from the treasury, certified in the usual form, and contained a count for money had and received, and other counts not necessary to be mentioned; issue was joined on the plea of *non assumpsit;* and by agreement of counsel, a verdict for the United States was taken for the sum claimed, subject to the opinion of the court upon the laws of the United States relative to the pay and emoluments of the officers of the army and the regulations and orders of the executive department, issued in pursuance of those laws. The court, on consideration, gave judgment in favor of the United States; and the cause is now before this court, by writ of error, for their decision.

The claim of the plaintiff in error to double rations, as charged, rests altogether upon a correct construction of the 5th section of the Act of the 16th of March, 1802, and of the regulations and orders of the executive department, issued in pursuance of that section. The President of the United States has a discretionary power to allow such additional number of rations to officers commanding at separate posts, as he may think just; having respect to the special circumstances of each post. The law granting this authority is not imperative, and in the exercise of his discretion the President may allow or *refuse to allow additional rations, as in his [*297] opinion he may deem just.

The reason of the authority to grant the allowance is obvious. By an independent command, at a separate post, the officer is subject to additional expense and an increase of duty. An officer may be said to command at a separate post, when he is out of the reach of the orders of the commander-in-chief, or of a superior officer in command in the neighborhood. He must then issue the necessary orders to the troops under his command, it being impracticable to receive them from a superior officer. His authority is the source from which they must flow.

There can be no controversy about additional rations, if the President makes the allowance. He may issue the order himself, or it may be done by the secretary of war, with his approbation. The secretary of war, as the legitimate organ of the President, under a general authority from him, may exercise the power and make the allowance to officers having a separate command. The language of the law is plain and unambiguous. No officer is entitled to the additional allowance unless he be a commandant at a separate post, and

then the claim must be sanctioned by the Executive. The allowance cannot be made to more than one officer at the same station.

It is not contended, in the case under consideration, that the grant was made by the President; but the plaintiff in error claims it under the orders which have been recited, and which are spread upon the record, and because officers of equal rank, and, in his opinion, similarly circumstanced, have received the additional allowance. Double rations form no part of the regular and legal emoluments of a brigadier-general, and can only be claimed under circumstances before enumerated. The plaintiff in error seems to rely with more confidence on the order of the 6th of March, 1816, taken in connection with the opinion of General Jessup. That order directs the additional allowance to be made to generals commanding divisions, and to officers commanding military departments, &c.; and General Jessup was of opinion that, according to the general usage of the army, the department of adjutant and inspector-general was a military department; and that, whilst exercising that office, he was commandant of a military department, and, as such, subject to the expense of an independent command.

The record contains no evidence that the adjutant and inspector-general was ever ordered to an independent or separate command. In the discharge of his ordinary duties, he has no distinct command; his duties consist in details of service, and not in active mil-
[* 298] itary command. The order of the * 16th of March, 1816, directing double rations to be allowed to officers commanding military departments, is construed to relate to the geographical sections of country into which the two divisions of the army are divided, and which were denominated departments, and intended to designate the extent of actual command given to the officer commanding each department; and that it does not relate to the law of the 3d of March, 1813, for the better organization of the general staff of the army. This appears to have been the construction given to the order by the war department, as none of the staff officers created by that act, with the exception of the plaintiff in error, ever made a claim for double rations; and the claim under consideration was disallowed by the accounting officers of the war department.

During the time the adjutant and inspector-general was stationed at the seat of government, comprehending the space for which double rations are claimed, it does not appear that there was any recognized commanding officer. The staff officers then stationed at the seat of government were subject to the authority of the secretary of war, and under his direct and exclusive control.

It is the opinion of the court that the claim of the plaintiff in error

is not sanctioned by the act of the 16th of March, 1802, nor by the regulations and orders of the executive department, issued in pursuance of that law.

The judgment of the circuit court is affirmed, with costs.

THE MECHANICS' BANK OF ALEXANDRIA, Appellants, *v.* LOUISA and ANNA MARIA SETON, Appellees, by their Guardian, &c.

1 P. 299.

A court of equity has jurisdiction to compel a bank to open its transfer books and permit a transfer of its stock.

An objection for want of parties ought not to prevail at the hearing, on appeal, except when the party is indispensably necessary.

A trustee, in whose name bank stock stands, and who is willing to transfer it to his *cestuis que trust*, is not a necessary party to a bill against the bank to compel it to allow a transfer.

The bank, under its charter, has no lien, for debts of a trustee, on stock held in trust, with the knowledge of the board of directors.

Cross-examining a witness is a waiver of irregularity in the time of taking the deposition.

THE case is stated in the opinion of the court.

Swann and *Wirt*, (attorney-general,) for the appellants.

Jones and *Taylor*, contrà.

* THOMPSON, J., delivered the opinion of the court. [* 304]

The appellees, who were the complainants in the court below, filed their bill against the Mechanics' Bank of Alexandria, setting out their right to $3,000 of the capital stock of that bank, which was standing in the name of Adam Lynn, but which was avowedly purchased and held by him as trustee for John Wise, the grandfather of the complainants, and from whom they derived their right and title to the stock in question; that they were desirous of having their stock transferred to their guardian, which the trustee, Adam Lynn, was willing to do, and offered to transfer the same; but that, on application to the bank, permission was refused, on the allegation that Adam Lynn was a debtor to the bank, and that it held a lien for that debt on all the stock of the bank which stood in his name. The bill alleges that when the stock was purchased by Adam Lynn for John Wise, and transferred to him upon the books of the bank, it was well known to the president and directors that the purchase was made by and transferred to Lynn in his character of trustee for John Wise, although the trust was not expressed in the transfer.

The bill prays that the bank may be compelled to open its transfer book, and permit Adam Lynn to transfer the $3,000 in stock to the

said Louisa and Anna Maria Seton, or to their guardian, Nathaniel S. Wise.

The bank, by its answer, denies that the board of directors knew or had any notice that Adam Lynn held the stock as trustee, but alleges that all the stock standing upon the books of the bank in the name of Adam Lynn was considered by the board of directors as his own stock, and avers that, at the time the answer was put in, there was no stock standing in his name on the books, but that the whole of it had been applied by the bank to the payment of his debts to it, according to articles of agreement between him and the cashier of the bank.

The bank also sets up the right, under its charter, to hold the stock for the payment of Lynn's debt, but had, under the agreement made with the cashier, as before mentioned, become the purchaser of the stock, for a full and fair consideration, without any knowledge that the complainants had any interest in the same.

The court below, upon the bill, answer, and exhibits, and proofs taken in the cause, decreed that the bank should cause its transfer book to be opened, and to permit Adam Lynn to [*305] * transfer the stock to Nathaniel S. Wise, guardian of the complainants, to be by him held in trust for their use. From this decree there is an appeal to this court, and the following points have been made, upon which a reversal of that decree is claimed.

1. That the subject-matter of the bill is not properly cognizable in a court of chancery; but that the remedy is at law, and the party to be compensated in damages.

2. That there is a want of proper parties.

3. That upon the merits, the bank has a right to hold and apply the stock, in payment of Adam Lynn's debt to it.

With respect to the first objection, it has been said that a court of chancery will not decree a specific performance of contracts; except for the purchase of lands or things that relate to the realty, and are of a permanent nature; and, that where the contracts are for chattels, and compensation can be made in damages, the parties must be left to their remedy at law. But notwithstanding this distinction between personal contracts for goods, and contracts for lands, is to be found laid down in the books, as a general rule, yet there are many cases to be found, where specific performance of contracts relating to personalty have been enforced in chancery; and courts will only weigh with greater nicety contracts of this description, than such as relate to lands.

But the application of this distinction to the present case, is not

perceived. If this had been a bill, filed against the bank, to compel a specific performance of any contract entered into with it, for the sale of stock, it might then be urged that compensation for a breach of the contract might be made in damages; and that the remedy was properly to be sought in a court of law. But the bill does not set up any contract between the complainants and the bank; nor does it seek a specific performance of any express contract whatever entered into with the bank. It only asks that the bank may be compelled to open its transfer book, and permit Adam Lynn to transfer the stock. By the charter and by-laws of the bank such transfer could only be made upon the books of the bank; and it was by their consent alone that this could be done.

Although it might be the duty of the bank to permit such transfer, it would be difficult to sustain an action at law for refusing to open its books and permit the transfer. Nor have the appellants shown such a claim to the stock as to authorize the court to turn the appellees round to their remedy at law, against Lynn, admitting they might have it. At all events, the remedy at law is not clear and perfect; and it is not a case for compensation in damages, but for specific performance; which can only be enforced in a court of chancery.

*2. The second objection, that Adam Lynn ought to [*306] have been made a defendant, would seem to grow out of a misapprehension of the object of this bill, and the specific relief sought by it.

It ought to be observed here, preliminarily, as matter of practice, that although an objection for want of proper parties may be taken at the hearing, yet the objection ought not to prevail upon the final hearing on appeal, except in very strong cases, and when the court perceives that a necessary and indispensable party is wanting.

The objection should be taken at an earlier stage in the proceedings, by which great delay and expense would be avoided.

The general rule, as to parties, undoubtedly is, that when a bill is brought for relief, all persons materially interested in the subject of the suit ought to be made parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all parties interested. But this is a rule established for the convenient administration of justice, and is subject to many exceptions; and is, more or less, a matter of discretion in the court; and ought to be restricted to parties, whose interest is involved in the issue, and to be affected by the decree. The relief granted will always be so modified as not to affect the interest of others; 2 Mad. Ch. 180; 1 Johns. Ch. 350.

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Where was the necessity or even propriety of making Lynn a party? No relief is sought against him. The bill expressly alleges that he was perfectly willing to make the transfer; but permission was refused by the bank. There is no allegation in the bill upon which a decree could be made against Lynn; and it is a well-settled rule, that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree. 2 Mad. Ch. 184; 3 P. Will. 310, n. 1.

The contest with respect to the right to the stock, is between the complainants and the bank; and it cannot be necessary to bring Lynn into the suit, in order to determine that question. He claims no right to the stock; and if the bank has established its right to hold it, for the payment of Lynn's debt, the complainants have no pretence for requiring the books of the bank to be opened, and to permit the transfer to be made, as prayed in the bill. The bank cannot compel the complainants to bring Lynn before the court, as a defendant, for the purpose of litigating questions between themselves with which the complainants have no concern. No objection to the decree can, therefore, be made for want of proper parties.

The remaining inquiry is, whether the bank is entitled to hold this stock as security, or apply it in payment of Lynn's debt,
[*307] *either by virtue of its charter or under the agreement between him and the cashier.

An objection, however, has been made preliminarily to this court's noticing the deposition of Adam Lynn; because, as is alleged, it was taken after the cause was set down for hearing, and without any order of the court for that purpose.

Admitting this to have been irregular, no objection appears to have been made in the court below to the reading of the deposition; and had it been made it ought not to have prevailed even there, because the defendants cross-examined the witness, which would be considered a waiver of the irregularity.

But at all events the objection cannot be listened to here, according to the express rule of this court, (February term, 1824,) which declares, "that, in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent."

It is deemed unnecessary to enter into an examination of the proofs in the cause to show that, in point of fact, the stock in question was held by Lynn in trust for the complainants; and that this fact was

known to the board of directors, when it was transferred to him by James Sanderson. The evidence establishes these points, beyond any reasonable ground of doubt; and the real question is, whether the bank, with full knowledge of the board of directors, that this stock was not the property of Lynn, but held by him in trust for the appellees, can assert a lien upon it for the private debt of Lynn, either under the charter or the agreement made with Chapin, and the transfer made by him to the bank.

The equity of the case must strike every one very forcibly, as being decidedly with the appellees. And unless the claims of the bank can be sustained by the clear and positive provisions of its charter, the decree of the court below ought to be affirmed.

This claim is asserted under the provisions of the 3d and 21st sections of the act of congress,[1] incorporating the bank.

The third section, after providing for the opening the subscription for the stock, and pointing out the manner in which the excess shall be reduced, in case the subscription shall exceed the number of shares allowed to be subscribed, has this proviso: "Provided always, that it is hereby expressly understood that all the subscriptions and shares obtained in consequence thereof shall be deemed and held to be for the sole and exclusive use and benefit of the persons, co-
*partnerships, or bodies politic, subscribing, or in whose [*308]
behalf the subscriptions respectively shall be declared to be made at the time of making the same; and all bargains, contracts, promises, agreements, and engagements, in anywise contravening this provision, shall be void." The 21st section declares, "that the shares of the capital stock shall be transferable at any time, according to such rules as may be established by the president and directors; but no stock shall be transferred, the holder thereof being indebted to the bank, until such debt be satisfied; except the president and directors shall otherwise order it."

These sections, when taken together, have been supposed to require a construction, that the stock shall be deemed to belong to the person in whose name it stands upon the books of the bank; and that the bank is not bound to recognize the interest of any *cestui que trust;* and may refuse to permit the stock to be transferred whilst the nominal holder is indebted to the bank.

This construction, however, in the opinion of the court, cannot be sustained. The third section must clearly be understood as applying to the first subscription for the stock; and was intended to prevent one person subscribing for stock in the name of another, for his own benefit.

[1] 2 Stats. at Large, 735.

The construction of the 21st section will depend upon the interpretation to be given to the word holder, as there used. This term is not necessarily restricted to the nominal holder. It will admit of a broader and more enlarged meaning; and may well be applied to the party really and beneficially interested in the stock. And there can be no good reasons why it should not be so applied when the bank is fully apprised of all circumstances in relation to the stock, and knows who is the real holder thereof.

This provision was intended to put into the hands of the bank additional security for debts due from stockholders. But when it is known that the person in whose name the stock stands has no interest in it, he will acquire no credit upon the strength of such stock; and that such was the understanding of the bank, in this case, is clearly shown by the evidence. For, when the transfer was made to Lynn, he asked to have the discount continued to him, which Sanderson, from whom he purchased, had upon the stock. But this was refused, on the ground that the stock did not belong to Lynn, but to Wise. There is no evidence in the cause to show that Lynn's debt was contracted with the bank after the stock was transferred to him; or that he has, in any manner, obtained credit with the bank on account thereof; but the contrary is fairly to be under-
[* 309] stood from the proofs. Nor does the bank allege the * insolvency of Lynn; or that it has not a full and complete remedy against him, without having recourse to this stock.

To permit the bank, under such circumstances, to avail itself of this stock to satisfy a debt contracted without any reference to it as security, and with full knowledge that Lynn held it in trust for the complainants, would be repugnant to the most obvious principles of justice and equity. Suppose the trust had been expressly declared upon the transfer book of the bank; would there be the least color for sustaining the claim now set up? And yet Lynn would be the legal holder of the stock, in such case, as much as in the one now before the court. Full notice of a trust draws after it all the consequences of an express declaration of the trust, as to all persons chargeable with such notice.

It is a well-settled rule in equity that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees, and bound, with respect to that special property, to the execution of the trust. 2 Mad. Ch. 125; 1 Sch. & Lef. 262.

Notice to an agent is notice to his principal. If it were held otherwise, it would cause great inconvenience; and notice would be avoided in every case, by employing agents. 2 Mad. Ch. 326.

Notice to the board of directors, when this stock was transfered to Lynn, that he held it as trustee only, was notice to the bank; and no subsequent change of directors could require a new notice of this fact. So that, if the bank had sustained any injury by reason of a subsequent board not knowing that Lynn held the stock in trust, it would result from the negligence of its own agents, and could not be visited upon the complainants. But no such injury is pretended. From any thing that appears to the contrary, Lynn is fully able to pay his debt to the bank.

The case of the Union Bank of Georgetown v. Laird, 2 W. 390, has been supposed to have a strong bearing upon the one now before the court. But the circumstances of the two cases are very dissimilar. In the former, Patton was the real as well as the nominal holder of the stock when he contracted his debt with the bank, and when his acceptance fell due, and the lien of the bank, no doubt, attached upon the stock; and this was previous to the assignment of it to Laird; and the question there was, whether the bank had done any thing which ought to be considered a waiver of the lien. But, in the present case, Lynn never was the real owner of the stock, and the bank well understood that he held it as trustee, and no lien for Lynn's debt ever attached upon it.

The appellants cannot, therefore, under any provisions in their charter, apply this stock to their own use, for the debt of *Lynn, to the prejudice of the rights of the known *cestui que trusts.* [*310]

Nor is there any ground upon which the claim of the bank can be sustained, under the agreement made between Lynn and Chapin, the cashier, and the transfer thereof, made by the latter to the bank. If the bank, as has already been shown, was chargeable with the knowledge that Lynn was a mere trustee, it could acquire no title from him, discharged of the trust; and if necessary, might itself be compelled to execute the trust. Nor has the bank any title to this stock under the transfer made by Chapin. This was done without any legal authority, being several months after Lynn had revoked the power of attorney under which the transfer was pretended to be made; and with full knowledge that Lynn was not the owner of the stock. But another and complete answer to the whole of this arrangement between Chapin and Lynn, is, that it was made long after the bill in this case was filed; and it is a well-settled rule, that the court is not bound to take notice of any interest acquired in the subject-matter of the suit, pending the dispute.

The decree of the court below must accordingly be affirmed, with costs.

ROBERT BARRY, Plaintiff in Error, *v.* THOMAS FOYLES.

1 P. 311.

A variance between an account filed to obtain an attachment, and the declaration filed after the defendant appeared and discharged the attachment, is of no importance.

A general agent of a manufacturing establishment gave a certificate that a certain amount was due on settlement, from the firm whose agent he was; held to be admissible evidence against his principals, when connected with circumstances which tended to prove that the debt was contracted for materials used by him in the manufacture.

The non-joinder of a partner as a defendant in an action of *assumpsit*, can only be pleaded in abatement.

THE case is stated in the opinion of the court

Coxe and *Worthington*, for the plaintiff.

Jones, contrà.

[*314] MARSHALL, C. J., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of the United States for the District of Columbia, sitting in the county of Washington. The defendant in error had sued out an attachment against Robert Barry, and had filed an account against James D. Barry and Co., said to be assumed by Robert Barry. Robert Barry appeared, gave special bail, and discharged the attachment. Thomas Foyles then filed a declaration of *indebitatus assumpsit*, for money had and received, and for goods, &c., delivered; to which Robert Barry pleaded the general issue, and the parties went to trial.

At the trial, the plaintiff in the circuit court offered in evidence three paper writings, signed by Edmond Rice; and also produced Thomas Rice, a witness, who swore that at the time the said paper writings bear date, and for a long time before and after, E. Rice, whose name is signed to the said writings, was foreman and manager of a tanyard in Washington; kept the books, bought and sold leather, and managed the whole concern for the proprietors; that the said papers are in his handwriting; that the said Foyles, for about seven years, (including the dates of said writings,) being a butcher, was in the habit of delivering, from time to time, great numbers of hides, to the said Rice, at the said yard, and had contracted with the said Rice to deliver there all the hides of the cattle slaughtered by him. That the said business was carried on in the name of James D. Barry, living in Washington, till a settlement, which witness understood took place between the said James D. Barry and Robert Barry; after a while it was carried on in the name of Robert Barry. The witness was not present at the settlement, and does not know

its nature or terms. During the time that the business was carried on in the name of James D. Barry, Robert Barry, (who resided in Baltimore,) came about twice a year to the yard in Washington, where he spent considerable time in examining and posting the books, with the said E. Rice. Upon one of these occasions, he directed a parcel of leather, which E. Rice had prepared to send on to him to Baltimore, to be kept in the yard till he should return to Baltimore, or ascertain the price of leather there, and give further directions concerning it. During all the time the business was conducted at Washington in the name of James D. Barry, the greater part of the leather manufactured in the yard was sent on to Baltimore to the defendant, and there disposed of by him.

The following are the paper writings offered in evidence, to which the testimony of Thomas Rice refers: —

No. 1. Balance due by James D. Barry to Thomas Foyles on settlement, say $1,640.75, up to this date, say April 5, 1817,
$1,640.75. EDMOND RICE.

No. 2. Amount of hides and skins received of Mr. Thomas Foyles, from the 1st of April, 1817, to this date, say December 27, 1818.

755 hides, at $3.75 per hide,	$2,831 25
10 sheep-skins, at 50c. each,	5 00
7 calf-skins do. at $1 each,	7 00
	$2,843 25

January 13, 1819. EDMOND RICE.

No. 3. Amount of hides and skins received of Mr. Thomas Foyles, from the 2d of February, 1819, to 2d of December, 1819.

346 hides, at $3.75 each,	$1,297 50

EDMOND RICE.

The counsel for the defendant objected to the admission of these papers. His objection being overruled, an exception was taken to the opinion.

A verdict was found for the plaintiff below, the judgment on which has been brought into this court by writ of error.

In argument, some observations were made on the variance between the manner in which the plaintiff in error was charged in the account filed in the attachment, and in the declaration on which the cause was tried. In the account, he is charged on his *assumpsit* for a sum

due from James D. Barry and Co. The declaration charges him as being originally indebted on a transaction with himself. The court attaches no importance to this variance, because when the attachment was discharged by the appearance of the defendant, and giving bail, and the plaintiff, in consequence thereof, filed a declaration, to which the defendant pleaded, the cause stood in court as if the suit had been brought in the usual manner; and no reference can be had to the proceedings on the attachment.

Considering the case as it is made out in the pleadings, the defendant in the circuit court is charged, on his original liability, for a transaction of his own. Edmond Rice having been manager of the whole concern for the proprietors of the tanyard in Washington, with power to buy hides and sell leather, there can be no doubt of his power to charge them for skins and hides received by him in the course of business. The papers No. 2 and 3 purport on their face to be an account of transactions of this description. The only objection [*316] made to them is, that instead of the journal of hides *delivered on each day, the manager has given, at considerable intervals, the total amount of hides received from the last preceding settlement up to that time. We are not aware of any principle which can make such a general certificate less binding than one detailing the separate transactions of each day. The proprietors themselves, or either of them, might have made the same acknowledgment; and we perceive no reason why the acknowledgment of the manager, so far as respects the form in which it is made, should not be of the same obligation as that of the proprietors.

The paper No. 1 is more questionable. It does not purport to be given for hides received at the tanyard, nor does it express the items which constitute the charge; but it is said to be the balance due from James D. Barry, (in whose name the business was conducted,) "on settlement." Edmond Rice, the person who gave this certificate, had authority to give it on account of the transactions of the tanyard; and it does not appear that he had authority to give it on any other account. It is an additional circumstance of no inconsiderable weight that the account closes on the 5th of April, 1817, the day on which the subsequent account, which is avowedly for hides, commences. These circumstances combined were, we think, sufficient to justify the submission of this paper also to the jury.

The next objection to the admission of these papers is, that the plaintiff in the circuit court has failed to prove that Robert Barry was one of the proprietors of the tanyard, while the business was conducted in the name of James D. Barry.

The evidence on this point was given by Thomas Rice, and has

been already fully stated. We think the testimony of a partnership was very strong. It could not, with propriety, have been withheld from the jury.

The question on which the plaintiff in error most relies remains to be considered.

This suit is brought on a partnership transaction against one of the partners. The declaration states a contract with the partner who is sued, and gives no notice that it was made by him with another. Will evidence of a joint *assumpsit* support such a declaration?

Although it has been held from the 36 H. 6 Ch. 38, that a suit against one of several joint obligors might be sustained, unless the matter was pleaded in abatement, yet, with respect to joint contracts, either in writing or by parol, a different rule was formerly adopted, upon the ground of a supposed variance between the contract laid, and that which was proved. This distinction was overruled by Lord Mansfield, in the case of Rice *v.* Shute, 5 Burr, 2611. The same point was afterwards adjudged in Abbott *v.* Smith, [*317] 2 W. Black. 947, and has been ever since invariably maintained. The principle is that a contract made by copartners is several as well as joint, and the *assumpsit* is made by all and by each. It is obligatory on all and on each of the partners. If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action, the policy of the law does not permit him to avail himself of it at the trial.

The course of decisions since the case of Rice *v.* Shute, has been so uniform, that the principle would have been considered as too well settled for controversy, had it not lately been questioned by a judge from whose opinions we ought not lightly to depart.

That judge supposed that if the defendant had no notice in the previous stage of the proceedings which might inform him of the nature of the action, he was guilty of no negligence in failing to plead in abatement, and ought not to be deprived of his defence at the trial.

But the declaration never gives this notice where the suit is brought against one only of the partners. He is always proceeded against as if he were the sole contracting party; and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained. The cases cited by Mr. Sergeant Williams, in note 4, on the case of Cabell *v.* Vaughan, 1 Saund. 291, n. 4, shows conclusively that the want of notice has never been considered since Rice and Shute, as justifying this exception to the evidence at the trial.

We think there is no error, and the judgment is affirmed.

12 P. 300; 13 P. 302.

PETER DOX, GERRIT LA GRANGE, AND ISAIAH TOWNSEND, impleaded with GERRIT L. DOX, Plaintiffs in Error, *v.* THE POSTMASTER-GENERAL OF THE UNITED STATES, Defendant in Error.

1 P. 318.

Under the act of April 30, 1810, s. 29, (2 Stats. at Large, 602,) though the postmaster-general is made liable for sums due from delinquent postmasters, if he does not cause a suit to be instituted within six months after a default, yet neither the postmaster nor his sureties are discharged by such omission to sue.

Laches of the officers of the United States does not of itself discharge sureties on an official bond.

No presumption of payment of such a bond arises from the lapse of a little more than five years.

THE case is stated in the opinion of the court.

S. A. Foot, for the sureties.

Wirt, (attorney-general,) contrà.

[*323] *MARSHALL, C. J., delivered the opinion of the court. This suit was instituted against Gerrit L. Dox, a deputy postmaster, and against his sureties, on a bond given for the faithful performance of his duty. It was brought in the district court for the northern district of New York, and was removed, by writ of error, into the circuit court sitting in the southern district of New York, composed of the associate justice of this court and the judge of the southern district. On the hearing, the judges were divided in opinion upon three questions, which have been certified to this court: —

1. Whether the district court had jurisdiction of the cause.

2. Whether by the facts appearing on the record, and admitted by the pleadings, or found by the jury, the sureties are exonerated, or discharged from their liability upon the bond so given by them, as set forth in the record.

3. Whether the said bond, from the facts found or admitted by the pleadings, as appearing by the record, can, in judgment of law, be considered as paid and satisfied, or otherwise discharged.

1. The question first to be considered, respects the jurisdiction of the court. The difficulties which were believed to attend it, when this cause was adjourned, have been removed, by the opinion of this court in the case of the Postmaster-General *v.* Early, 12 W. 136.

In that case, the question was fully considered and deliberately decided. The time which intervened between the default of the officer and the institution of the suit, exceeded the time prescribed by the act of congress, in that case as well as this. Consequently,

the circumstances of the two cases are, in this respect, precisely the same. But the counsel for the deputy postmaster says, that this point was not brought into the view of the court, and has not been considered. The opinion of the court, undoubtedly, did not take a view of the question, whether the postmaster-general possessed such an interest in the cause that it ceased to be a suit brought for the United States. This inquiry was not made in terms, but could not have escaped observation. The act of congress for regulating the post-office establishment does not, in terms, discharge the obligors from the direct claim of the United States on them, on the failure of the postmaster-general to commence a suit against the *defaulter, within the time it prescribes. Their liability, [*324] therefore, continues. They remain the debtors of the United States. The responsibility of the postmaster-general himself, is superadded to not substituted for that of the obligors. The object of the act is to stimulate the postmaster-general to a prompt and vigilant performance of his duty, by suspending over him a penalty, to which negligence will expose him; not to annul the obligation of his deputy. Had the object of the act been to favor the sureties its language would have indicated that intention. If this construction be correct, the obligors in this bond remain the debtors of the United States, and the superadded responsibility of the postmaster-general cannot affect the reasoning on which the jurisdiction of the court was sustained in the case of the Postmaster-General *v.* Early.

The second question proposed for the consideration of the court is whether, on the facts appearing in the record, the sureties are discharged from their obligations.

The breaches assigned, are: —

1. That Gerrit L. Dox failed to render accounts of his receipts and expenditures, as deputy postmaster.

2. That he had failed to pay over the moneys he had received over and above his commissions, &c.

The defendant pleaded. 1. *Non est factum.* 2. That Gerrit L. Dox did render true accounts, &c.; and 3. That he did pay over the moneys he received. The issues joined on these pleas were found for the plaintiff.

The question arises on other pleas, the issues on which were found for the defendants; and which state, in substance, that Gerrit L. Dox was removed from his office on the 1st day of July, 1816. That the postmaster-general did not open an account against him and make any claim and demand on him for the moneys received by him as postmaster, until the 1st day of July, 1821. That at the time of his removal from office he was solvent and able to pay his debts, and

continued so until the 1st day of July, 1819, after which he became insolvent, and continues to be so. These pleas also state that the postmaster-general, well knowing that Gerrit L. Dox had neglected and refused to pay over the moneys due from him, as postmaster, at the end of every quarter, &c., did not commence a suit until August, 1821.

These facts placed on the record, without explanation, must be admitted to show a gross neglect of duty on the part of the postmaster-general. Does this neglect discharge the sureties from their obligations?

The condition of the bond is broken, and the obligation has become absolute.

Is the claim of the United States upon them released by
[* 325] the *laches of the officer to whom the assertion of that claim was intrusted?

This question, also, has been settled in this court.

The case of the United States *v.* Kirkpatrick and others, 9 W. 720, was a suit instituted on a bond, given by a collecter of direct taxes and internal duties, under the act of 22 July, 1813, c. 16.[1] The act required each collector to transmit his accounts to the treasury, monthly, to pay over the moneys collected, quarterly; and to complete his collection, pay over the moneys collected to the treasury, and render his final account within six months from the day on which he shall have received the collection list from the principal assessor. In case of failure, the act authorizes and requires the comptroller of the treasury immediately to issue his warrant of distress against such delinquent collector and his sureties. The comptroller did not issue his warrant of distress according to the mandate of the law; and this suit was instituted four years after such warrant ought to have been issued.

The court left it to the jury to decide whether the government had not, by this omission, waived its resort to the sureties. A verdict was found for the defendants, the judgment on which was brought before this court by writ of error.

The counsel for the defendant urged that laches might be imputed to the government, through the negligence of its officers, but this court reversed the judgment, declaring the opinion that the charge of the court below, which supposes that laches will discharge the bond, cannot be maintained in law: "The utmost vigilance," it was said, "would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities." It was further said, that the

[1] 3 Stats. at Large, 22.

provisions of the law which require that settlements should be made at short and stated periods, are created by the government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the security. After a full discussion of the question, the court laid down the principle, "that the mere laches of the public officers constitutes no grounds of discharge in the present case." The same question came on to be again considered in the case of the United States *v.* Vanzandt, 11 W. 184.

This was an action of debt brought up on a paymaster's official bond, against one of the sureties. The act for organizing the general staff, and making further provision for the army of the United States,[1] "makes it the duly of the paymaster to render his vouchers to the paymaster-general, for the settlement of his accounts;" and if he fail to do so, for more than six *months after he [*326] shall have received funds, the act imperatively enjoins "that he shall be recalled, and another appointed in his place." The paymaster had failed to comply with the requisites of the law, after which the paymaster-general, instead of obeying its mandate, by removing him, placed further funds in his hands. The circuit court instructed the jury that the defendant, the surety, was not chargeable for any failure of the paymaster to account for such additional funds so placed in his hands after his said default and neglect in respect of the funds previously received were known; and a verdict was found for the defendant. The judgment on this verdict was also brought before the court, by a writ of error, and was reversed.

The counsel for the defendant contended that this case differed from the United States *v.* Kirkpatrick and others, 9 W. 720, but the court said: "The provisions in both laws are merely directory to the officers, and intended for the security and protection of government, by insuring punctuality and responsibility; but they form no part of the contract with the surety." The placing further funds in the hands of the defaulting paymaster, was considered as the necessary consequence of his continuance in office. This is certainly a very strong case. These two cases seem to fix the principle that the laches of the officers of the government, however gross, do not of themselves discharge the sureties in an official bond, from the obligation it creates; as firmly as the decisions of this court can fix it. We think they decide the question now under consideration.

The third question is whether the bond can, upon the facts of the case, be considered, in judgment of law, as paid and satisfied, or otherwise discharged. If this question was founded on the time

[1] 3 Stats. at Large, 297.

which was permitted to elapse before the institution of the suit, the answer must be in the negative. The bond was executed on the 1st day of January, 1816, the postmaster was removed from office on the 1st day of July, in the same year, and this suit was instituted in August, 1821. But little more than five years intervened, between the time when the sum due from the principal in the bond was ascertained, and the institution of the suit. The presumption of payment has never been supposed to arise from length of time in such a case, even between individuals; much less in the case of the United States, where all payments are placed on that record which must be kept by the officers of government. An additional reason exists against the presumption in this case. Length of time is evidence to be laid before the jury on the plea of payment. The pleas on which this presumption is supposed to arise, not only do not allege payment, but presuppose that payment has not been made, which [*327] failure they ascribe to * the laches of the postmaster-general. In such a case, there can be no ground for presuming payment and satisfaction.

That part of the question which is general, and which refers it to the court to decide whether the bond has been "otherwise discharged," is understood to be a repetition of the second question, and to be answered in the answer given to that question.

This court is of opinion that it be certified to the circuit court of the United States for the southern district of New York: —

1. That the district court had jurisdiction of this cause.

2. That the sureties are not exonerated from their liability, upon the bond given by them, as set forth in the record.

3. That the said bond cannot be considered, in judgment of law, as paid and satisfied, or otherwise discharged.

This cause came on, &c. on consideration whereof, this court is of opinion — 1. That the district court of the northern district of New York had jurisdiction of the said cause. 2. That the sureties to the bond on which the said suit was instituted are not exonerated or discharged from their liability on the said bond, by the facts appearing on the record and admitted by the pleadings, or found by the jury. 3. That the said bond cannot, from the facts found or admitted by the pleadings, or appearing by the record, be considered, in judgment of law, as paid and satisfied, or otherwise discharged. All which is directed to be certified to the circuit court of the United States for the southern district of New York in the second circuit.

8 H. 83.

JAMES ELLIOTT the younger, BENJAMIN ELLIOTT, ANDERSON TAYLOR, REUBEN PATER, PATSEY ELLIOTT, AND WILFORD LEPELL, *v.* THE LESSEE OF WILLIAM PEIRSOL, LYDIA PEIRSOL, ANN NORTH, JANE NORTH, SOPHIA NORTH, ELIZABETH F. P. NORTH, and WILLIAM NORTH, Defendants in Error.

1 P. 328.

Though declarations of aged and deceased members of a family, concerning its pedigree, are not admissible if made *post litem motam*, yet this rule applies only when the *lis mota* concerns the pedigree, not some other question involved in the title.

A court is not bound to do more than to respond to a motion to reject evidence in the terms in which it is made. If the motion be to reject all, and some is competent, it is not error to deny the motion.

The privy examination and acknowledgment of the deed of a *feme covert* cannot be proved by parol.

When the clerk has made a record of his certificate of such examination and acknowledgment he is *functus officio*, and cannot afterwards amend the certificate.

The jurisdiction of a county court may be inquired into by a circuit court of the United States when the proceedings of the former are relied on in the latter; and if no jurisdiction existed the proceedings are void.

THE case is stated in the opinion of the court.

Wirt, (attorney-general,) for the plaintiffs.

Wickliffe, contrà.

* TRIMBLE, J., delivered the opinion of the court. [*333]

This is an action of ejectment, brought in the circuit court for the district of Kentucky, by the lessors of the defendant in error, and against the plaintiffs in error, who were defendants in the court below.

The lessors of the plaintiff, in that court, claimed the land in controversy, as heirs at law of Sarah G. Elliott, formerly Sarah G. Peart, deceased; who, in her lifetime, had intermarried with the defendant, James Elliott. The defendants claimed by virtue of a deed of conveyance, made by James Elliott and Sarah G. Elliott his wife, in her lifetime, to Benjamin Elliott, and a deed reconveying the land from Benjamin Elliott to James Elliott.

On the trial of the general issue between the parties, the defendants took a bill of exceptions to certain opinions of the court, in overruling motions made by the defendants for instructions, &c., and in granting instructions to the jury, moved by the * plaintiff, [*334] in the progress of the trial; and, a verdict and judgment having been rendered against the defendants, they have brought the case before this court by writ of error.

The bill of exceptions states that, upon the trial of this case, the

plaintiffs read as evidence a patent from the commonwealth to Griffin Peart, dated the 1st of May, 1781, covering the land in controversy, (which patent is made part of the bill of exceptions,) and sundry depositions, taken and filed in the cause, (also made part of the bill of exceptions;) and proved that, upon a division of the land granted to Griffin Peart, by said patent, the part in contest was allotted to the late Sarah G. Elliott, formerly Sarah G. Peart, and that she was seized thereof in severalty; that the said Sarah G. Elliott died before the institution of this suit, about the year 1822, without issue; and that the defendants were in possession of the land allotted to her as aforesaid. And after the plaintiffs had closed their evidence, touching their derivation of title, the defendants, as they had reserved the right to do, moved the court to instruct the jury that the evidence adduced on the part of the plaintiffs was insufficient to prove title in the lessors of the plaintiffs, and that the same ought to be rejected; but the court refused so to instruct or to exclude the evidence; and, on the contrary, instructed the jury that the said evidence, if believed by them, was *primâ facie* evidence that the lessors were the legal heirs of the patentee, Griffin Peart, &c. To which opinion of the court, in all its parts, the defendants except.

The defendants then gave in evidence the deed of conveyance from Sarah G. Elliott and her husband to Benjamin Elliott, (dated the 12th day of June, 1813,) for the land in contest, and the deed from Benjamin Elliott to the said James, together with all the indorsements upon and authentications annexed to the first mentioned deed; which indorsements and authentications are in the following words and figures, to wit: "Acknowledged by James Elliott and Sarah G. Elliott, September 11, 1813.

Attest:— J. M'Kinney, Jr., Clerk.

"Woodford County, *sct.* September 11, 1813.

This deed, from James Elliott, and Sarah G. Elliott his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded. John M'Kinney, Jr., C. W. C. C."

'Woodford County, *sct.* November County Court, 1823.

"On motion of Benjamin Elliott, by his attorney, and it appearing to the satisfaction of the court by the indorsement on the deed from James Elliott and wife to him, under date of 12th June, 1813, and by parol proof, that said deed was acknowledged
[*335] *in due form of law by Sarah G. Elliott, before the clerk of this court, on the 11th of September, 1813; but that the

certificate thereof was defectively made out. It is ordered that the said certificate be amended to conform to the provisions of the law in such cases, and that said deed and certificate, as amended, be again recorded. Whereupon said certificate was directed to be amended, so as to read as follows, namely:—

"WOODFORD COUNTY, *sct.* September 11, 1813.

This day, the within-named James Elliott, and Sarah G. Elliott, his wife, appeared before me, the clerk of the court of the county aforesaid, and acknowledged the within indenture to be their act and deed; and the said Sarah being first examined, privily and apart from her husband, did declare, that she freely and willingly sealed the said writing, which was then shown and explained to her by me, and wished not to retract it, but consented that it should be recorded. The said deed, order of court, and certificate, as directed to be amended, are all duly recorded in my office.

Attest:— JOHN M'KINNEY, Jr., C. W. C. C."

It was proved by John M'Kinney, a witness examined on the part of the defendants, that the indorsement made on the back of the deed from Elliott and wife to Benjamin Elliott, in these words, to wit: "Acknowledged by James Elliott and Sarah G. Elliott. September 11, 1813.

Attest:— J. M'KINNEY, Clerk;"

Was in the handwriting of the said clerk of the Woodford county court, and was the minute made by him, at the time said deed was acknowledged; and it was also proved that the certificate of the acknowledgment and recording of the said deed, indorsed on said deed, was, at some subsequent time, written and drawn out by a deputy of said clerk, from the said minute. And the clerk deposed that although he had not a particular recollection of all the facts, that he remembered the circumstance of James Elliott and his wife coming to his office to acknowledge said deed; that he knew what his duty required in such cases, and that the acknowledgment and privy examination, and an explanation of the instrument to her, was requisite, in order to its being recorded as to her. And that he did not doubt he had done his duty in this instance, and that said deed had been acknowledged by Mrs. Elliott, in all respects. Other parol evidence was given conducing to prove that, in point of fact, the said deed from Elliott and his wife was regularly acknowledged by the wife before the clerk, upon his privy examination of her.

The said M'Kinney, upon cross-examination, further proved that, after the said deed and certificate of the acknowledgment

[*336] *thereof had been recorded, and in the lifetime of Mrs. Elliott, he had, at the instance of her counsel, made out a true copy of the record of said deed, and certificate of the acknowledgment thereof, by Elliott and wife, as they were then upon the record; which copy the plaintiff gave in evidence; that, after the death of Mrs. Elliott, application was made to him, by the counsel of the defendants, to alter the certificate of the acknowledgment of the deed from Elliott, and wife to Benjamin Elliott, so as to state her privy examination; but which he declined. It was also proved that the deed had remained in the possession of the clerk, from the time of its first acknowledgment till after the certificate ordered by the county court was made upon it.

After the defendants had closed the evidence on their side, which was as above stated, the court, upon the motion of the plaintiffs' counsel, instructed the jury that the parol evidence, which had been given on the part of the defendants, conducing to show a privy examination of Mrs. Elliott, was incompetent for that purpose; that a privy examination and acknowledgment of a *feme covert*, so as to pass or convey her estate, could not legally be proved by parol testimony, but by record; and that, although they might believe from the parol evidence, that said deed had been acknowledged by Mrs. Elliott, in all due form of law, upon her privy examination, and all proper explanations given to her; yet, it constituted no defence to the action, unless such privy examination had been duly certified and recorded.

The court further instructed the jury that the certificate of the acknowledgment of said deed, by Elliott and wife, and the after certificate by order of the county court, of her privy examination, were not sufficient in law to pass her estate, because the first shows no privy examination, and the county court had no jurisdiction to order the second to be made. To all which opinions and decision of the court the defendants except, &c.

It is argued by the learned counsel in this court that the motion of the defendants to exclude the evidence adduced on the part of the plaintiffs, or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff, ought to have been granted. The argument in this court has not put the question on the ground that taking the whole of the plaintiff's evidence together, touching the derivation of the title of the lessors of the plaintiff, it is insufficient to deduce the title to them down from the patentee, through Sarah G. Elliott, who was seised thereof in severalty.

We have, however, reviewed the evidence with a view to that question, and are satisfied it is sufficient for that purpose.

The ground of argument relied on here is, that a part of the *evidence was incompetent and inadmissible. It is [* 337] said that so much of the depositions as detail Mrs. Elliott's conversations, concerning the manner of her acknowledgment of the deed, and so much of Mrs. Braugh's deposition as speaks of the letter of her deceased husband, and the letter itself, made part of her deposition, were incompetent, and ought to have been rejected; and that the reservation of the right to move to reject the evidence, admitted in the bill of exceptions, shows that the defendants' counsel had the right to insist upon the rejection of any part of the evidence as incompetent. The argument admits of several answers deemed satisfactory. Mrs. Elliott's conversation, detailed in some of the depositions in relation to the defendant's deed, can by no fair construction be brought within the motion. It related not to the title of the lessors of the plaintiff, but to supposed defects in the title of the defendants; and, to use the language of the bill of exceptions, it was the plaintiff's evidence "touching the derivation of the title of the lessors of the plaintiff," which the defendants moved to exclude. Besides, at that stage of the case, the defendants had not introduced the deed; and when we come to consider the defendants' title, after the deed was introduced, it will appear that Mrs. Elliott's declarations could in no manner have influenced the verdict, and were therefore harmless. We are not prepared to admit that Mrs. Braugh's letter on the subject of the family pedigree, proved by her evidence and made part of her deposition, was not competent evidence to be left to the jury upon a question of pedigree or heirship. She was an aged member of the family, and traces back the pedigree and several branches of the family for about seventy years.

The rule of evidence, that in questions of pedigree the declarations of aged and deceased members of the family may be proved and given in evidence, has not been controverted. But it is argued that this rule is qualified by this exception, that declarations made *post litem motam* cannot be given in evidence; and it is insisted this case comes within the exception; for although no suit had been commenced, yet a controversy had arisen or was expected to arise.

We doubt the application of the exception to this case. A controversy had arisen or was expected to arise between the heirs of Mrs. Elliott and the defendants, concerning the validity of the deed of Mrs. Elliott, made while she was a *feme covert*. But it does not appear that any controversy had arisen or was expected to arise, about who were her heirs. The *lis mota*, if it existed, was not who were heirs, but whether Mrs. Elliott's deed made a good title against the heirs,

whoever they might be. It is not necessary, however, to [*338] give any *positive opinion on this point, as other grounds exist upon which the motion was rightfully overruled.

It is conceded that the defendants' counsel had a right to move the court below to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent, but it is not admitted that he exercised that right. It does not appear from the bill of exceptions that he designated any particular piece or part of the evidence as objectionable, and moved the court to exclude it. But on the contrary, resting his case upon the assumption that the whole evidence of the plaintiffs, taken together, was either incompetent or insufficient, he moved the court either to exclude the whole or to instruct the jury that the whole was insufficient to prove title in the lessors of the plaintiff. This could not be done on the ground of incompetency, unless the whole was incompetent, which is not pretended; the court was not bound to do more than respond to the motion in the terms in which it was made. Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection. We have already said the evidence, taken all together, was sufficient to prove title in the lessors of the plaintiff. If any part of it was incomplete, the court might, on a general motion to exclude the whole, have excluded such parts; but the court was not obliged to do so. There is, therefore, no error in the decision of the circuit court overruling the motion of the defendants; nor in the instructions given to the jury upon that motion.

We now proceed to an examination of the questions arising out of the instructions given to the jury, on the motion of the plaintiffs, in relation to the deed of James Elliott and Sarah G. Elliott, his wife, to Benjamin Elliott, set up by the defendants in their defence.

The general question involved in the first instruction is, can the privy examination and acknowledgment of a deed by a *feme covert*, so as to pass or convey her estate, be legally proved by parol testimony? We hold that they cannot.

By the principles of the common law, a married woman can in general do no act to bind her; she is said to be *sub protestate viri*, and subject to his will and control. Her acts are not like those of infants and some other disabled persons, voidable only; but are in general absolutely void *ab initio*.

In Virginia and Kentucky, the solemn modes of conveyance by fine and common recovery have never been in common use; and in those States the capacity of a *feme covert* to convey her estate by deed is

the creature of statute law; and to make her deed effectual, the forms and solemnities prescribed by the statutes must be pursued.

*The Virginia statute of 1748, c. 1, after making pro- [* 339] visions to enable *femes covert* to convey their estates by deed upon acknowledgment and privy examination according to prescribed forms, in the 7th section, has these words: "Whereas it has always been adjudged that where any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." The 8th section enacts and declares: "That the law herein shall always be held according to the said judgments, and shall never hereafter be questioned, &c."

This law was adopted by Kentucky at her separation from Virginia, and is understood never to have been repealed.

The 4th section of the Kentucky statute of 1796, (see 1 Litt. Laws, 569,) provides for the privy examination and acknowledgment of *femes covert* in open court, and where they cannot conveniently attend, authorizes a commission to issue to two justices, to take and certify the acknowledgment and privy examination; and declares that: "In either case the said writing, acknowledged by the husband, and proved by witnesses to be his act, and recorded, together with such privy examination and acknowledgment, &c., shall not only be sufficient to convey or release any right of dower, &c., but be as effectual for every other purpose as if she were an unmarried woman."

The 1st section of this act authorizes clerks of the county courts, general court, and court of appeals, to take in their offices the acknowledgment or proof of the execution of deeds, and to record them upon acknowledgments or proofs so taken by themselves; but did not authorize them to take the acknowledgment and privy examination of *femes covert*.

But, by a subsequent statute, clerks are authorized to take in their offices the "acknowledgment of all deeds according to law." And the act of 1810, 4 Litt. Ky. Laws, 165, which authorizes the clerk of one county to take and certify the acknowledgment of a deed to be recorded by the clerk of another county where the land lies, &c., declares that, "if the due acknowledgment or privy examination of the wife, &c., shall have been taken, &c., by the clerk receiving the acknowledgment of the deed, &c., and that, being duly certified with the deed, and recorded, shall transfer such wife's estate, &c.," as fully as if the examination had been made by the court, or the clerk in whose office the deed shall be recorded.

It is by construction of these last-recited laws, that the clerks are held in Kentucky to be authorized to take the acknowledgments

and privy examination of *femes covert*, in all cases of deeds made by them and their husbands.

The Kentucky statutes above recited show clearly that the legislature of that State has never lost sight of the principle [* 340] *declared by the Virginia statute of 1748: "That when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs."

What the law requires to be done and appear of record, can only be done and made to appear by the record itself, or an exemplification of the record. It is perfectly immaterial whether there be an acknowledgment or privy examination in fact, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination merely, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*.

It is now only necessary to state the second instruction given to the jury on the plaintiff's motion, to manifest its entire correctness. It was, "that the first certificate of the acknowledgment and recording of the deed of Elliott and wife was not sufficient in law to pass her estate; because it showed no privy examination of the *feme*."

The last instruction given by the court to the jury presents a question of more difficulty. It is, "that the after certificate made by order of the county court of her privy examination is insufficient in law to pass her estate, because the county court had no jurisdiction or authority to order the said second certificate to be made."

It is argued that the circuit court of the United States had no authority to question the jurisdiction of the county court of Woodford county; and that its proceedings were conclusive upon the matter, whether erroneous or not.

We agree that if the county court had jurisdiction its decision would be conclusive. But we cannot yield an assent to the proposition, that the jurisdiction of the county court could not be questioned when its proceedings were brought collaterally before the circuit court. We know nothing in the organization of the circuit courts of the Union which can contradistinguish them from other courts in this respect.

Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply

void, and form no bar to a recovery sought even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers.

This distinction runs through all the cases on the subject; and it proves that the jurisdiction of any court exercising authority over a subject, may be inquired into in every court, when [* 341] the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings.

It is well known that the jurisdiction and authority of the county courts of Kentucky are derived wholly from the statute law of the State. In argument, we were referred to no statute which was supposed, either in terms or by fair construction, to confer upon the county court any supervising or controlling power over the acts of the clerk, in taking, in his office, the acknowledgment of a deed, or in recording it, upon an acknowledgment there taken by him. We have sought in vain for such a provision, and it is believed none such exists. No such supervising and controlling power can result to the court from the general relations which exist between a court and its clerk; for, in this case, the statutes confer upon the clerk, in his office, a distinct, independent, personal authority, to be exercised by him upon his own judgment and responsibility. We think, therefore, with the circuit court, that the county court had no jurisdiction or authority to order the after certificate of Mrs. Elliott's privy examination to be made and recorded.

But the argument, which seemed to be relied on most confidently by the learned counsel, is, that the order of the county court may be disregarded, and the amendment considered as an amendment made by the clerk, of his own authority; and that the clerk was authorized to amend his own certificate, and record, at any time.

It would be difficult to maintain that the second certificate or amendment, as it is called, could rightfully be regarded as the clerk's own act, independent of the order of the county court; it appearing that he refused to do the act until the order was made. But be it so.

Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed, at any time after the record was made? We are of opinion he had not.

We are of opinion he acted ministerially, and not judicially in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was, in its nature, but an act *in pais*, and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed, was *functus officio*, as soon as the record was made. By the exertion

of his authority, the authority itself became exhausted. The act had become matter of record, fixed, permanent, and unalterable; and the remaining powers and duty of the clerk were only to keep and preserve the record safely.

[*342] If a clerk may, after a deed, together with the acknowledgment *or probate thereof, have been committed to record, under color of amendment, add any thing to the record of the acknowledgment, we can see no just reason why he may not also subtract from it.

The doctrine that a clerk may, at any time, without limitation, alter the record of the acknowledgment of a deed, made in his office, would be, in practice, of very dangerous consequence to the land titles of the county, and cannot receive the sanction of this court.

It is the opinion of this court that there is no error in the judgment and proceedings of the circuit court, and the same are affirmed, with costs.

2 P. 157; 6 P. 95; 10 P. 449; 13 P. 498; 14 P. 599, 614; 2 H. 319; 3 H. 686, 750; 6 H. 31; 8 H. 495; 18 H. 19, 497.

LESSEE OF THOMAS SPRATT, ANDREW, WILLIAM, SARAH, JACOB, CATHARINE, AND PIERCE SPRATT, Plaintiffs in Error, *v.* SARAH SPRATT, Defendant in Error.

1 P. 343.

Under the law of Maryland, of December 19, 1791, which enables foreigners to take, hold, and transmit lands, a naturalized citizen is not included, but lands acquired by him before he became a citizen, are within the act.

THE case is stated in the opinion of the court.

Coxe, for the plaintiffs.

Key and *Jones*, contrà.

[*348] *MARSHALL, C. J., delivered the opinion of the court.

This is an ejectment brought in the circuit court for the District of Columbia, sitting in the county of Washington, for the recovery of several lots, lying in the county of Washington, of which James Spratt died seised. The lessors of the plaintiff are aliens, the legitimate brothers and sisters of the said James; and the defendant, who is also an alien, is his widow. James died without issue.

James Spratt came into America in the year 1812, and became a citizen on the 11th of October, in the year 1821. He purchased one of the lots before he became a citizen, and the others afterwards. The title to the lots in controversy depends on the construction of an act

of the State of Maryland, passed the 19th of December, 1791, entitled, "An act concerning the *territory of Colum- [*349] bia and the city of Washington." The 6th section provides, "that any foreigner may, by deed or will, to be hereafter made, take and hold lands within that part of the said territory which lies within this State, in the same manner as if he was a citizen of this State; and the same lands may be conveyed by him, and transmitted to, and be inherited by his heirs or relations, as if he and they were citizens of this State; provided, that no foreigner shall, in virtue hereof, be entitled to any further or other privilege of a citizen." The facts were stated in a case agreed, which was substituted for a special verdict. The circuit court gave judgment for the defendant, to which the plaintiff has sued out a writ of error.

The plaintiff contends that the word "foreigner," as used in the act, designates a person born in a foreign country, and that such person does not cease to be a foreigner, by becoming a citizen of the United States. The words of the act, therefore, apply to him, although he becomes a citizen, and enable him to take and transmit lands to his alien heirs or relations.

The court is not of this opinion. The act is an enabling act, and applies to those only who could not take without it. It enables a foreigner to take "in the same manner as if he was a citizen." This language is entirely inapplicable to a citizen.

An act to enable a citizen to take lands "as if he were a citizen," would be an absurdity too obvious to escape the notice of the legislature. We think, then, that a foreigner who becomes a citizen, is no longer a foreigner within the view of the act. His after purchased lands vest in him as a citizen, not by virtue of the act of the legislature of Maryland.

The lot which he purchased while an alien, stands on different principles. This lot was acquired by a foreigner, under the act which was passed for the purpose of enabling him to acquire it. He took and held it under the law, and could transmit it as prescribed by the law. The act, after enabling him to take, adds: "and the same lands may be conveyed by him, and transmitted to, and be inherited by his heirs or relations, as if he and they were citizens of this State." The capacity to transmit given by the act, extends, in terms, to all lands acquired under the act.

The lands taken "may be conveyed by him," that is, by the taker, "and transmitted to his heirs or relations." This power of transmission is not restricted to his character as a foreigner, but belongs to him, as a person taking lands under the act. The power of transmitting is connected with the power of taking, and is coextensive

with it. This power is within the words of the law; and the words which confer it are not inoperative, since they give a capacity which citizenship does not give — the capacity of transmitting to [* 350] relations who are * foreigners. This capacity is given absolutely by the act, and is not, we think, affected by his becoming a citizen.

The objection urged by the defendant to this construction, is, that it would perpetuate the title in aliens to the remotest times, because it attaches the privilege to the land and not to the person.

We do not think the construction exposed to this objection.

The land passes to the heirs or relations of the said James Spratt, precisely as it would have passed had he remained a foreigner. The capacity is not in the land, but in the person in relation to that land. It was in him when the land was purchased, and did not pass out of him, under the words of the law, by his becoming a citizen.

It is the opinion of a majority of the court that the circuit court erred in deciding that judgment ought to be rendered for the defendant. It ought to be reversed, and the cause remanded to the circuit court, with directions to enter judgment for the plaintiff for the lot which was acquired by the said James Spratt, while an alien, saving the widow's dower; and that his declaration be dismissed as to the residue.

This cause came on, &c., on consideration whereof, it is the opinion of this court that the said circuit court erred in deciding that judgment ought to be rendered for the defendant, and that the same ought to be reversed. Therefore, it is ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby reversed; and that the cause be remanded to the said circuit court, with directions to enter judgment for the plaintiff for lot No. , which was acquired by the said James Spratt, while an alien, saving the widow's dower; and that his declaration be dismissed as to the residue.

4 P. 392.

MONTGOMERY BELL, Plaintiff in Error, *v.* JAMES MORRISON, ANTHONY BUTLER, AND JONATHAN TAYLOR, Defendants in Error.

1 P. 351.

To remove the bar of the statute of limitations by a new promise, it must be determinate and unequivocal; and if a new promise is to be raised by implication of law from an acknowledgment, there must be an unqualified acknowledgment of a subsisting debt which the party is liable and willing to pay.

One partner cannot deprive the firm of the bar of the statute of limitations, after a dissolution of the partnership.

Under the 30th section of the Judiciary Act,[1] a deposition is not admissible if the certificate does not clearly show the deposition was reduced to writing in the presence of the magistrate.

THE case is stated in the opinion of the court.

Rowan and *Benton*, for the plaintiffs.

Jones, contrà.

* STORY, J., delivered the opinion of the court. [*355]

This cause comes before us upon a writ of error to the circuit court of the district of Kentucky. The original action was brought by the plaintiffs in error against the defendants, on the 16th of August, 1820, to recover the value of certain iron castings, sold and delivered to them by the plaintiff. The defendants pleaded *non assumpserunt*, and *non assumpserunt* within five years, (the latter being the time prescribed by the Kentucky statute of limitations in cases of this nature,) upon which pleas the parties were at issue; and at the trial, a verdict was returned by the jury for the defendants; upon which, judgment passed in their favor. A bill of exceptions was taken to certain points, ruled by the circuit court at the trial; and the validity of these exceptions has constituted the ground of the argument for the reversal, which has been insisted on in this court.

The first objection urged is the exclusion of the deposition of a Mr. Mockbee, which was offered by the plaintiff as testimony in the cause. The reason assigned for the exclusion is, that there was no proof, by the certificate of the magistrate or otherwise, that the deposition was reduced to writing in the presence of the magistrate. This is a point altogether dependent upon the construction of the act of congress of the 4th of September, 1789, under the authority of which the deposition purports to be taken. The authority to take testimony in this manner, being in derogation of the rules of the common law, has always been construed strictly; and, therefore, it is necessary to establish that all the requisites of the law have been complied with, before such testimony is admissible. The act of congress provides, "that every person deposing as aforesaid, shall be carefully examined and cautioned, and sworn or affirmed, to testify the whole truth, and shall *subscribe the testimony by him [*356] or her given, after the same shall be reduced to writing; which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions, so taken, shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken; or shall, together

[1] 1 Stats. at Large, 88.

with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any was given to the adverse party, be by him, the said magistrate, sealed up and directed to such court, and remain under his seal until opened in court."

Without doubt, the certificate of the magistrate is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury, if all the necessary facts are there sufficiently disclosed. It is not denied that the reducing of the deposition to writing, in the presence of the magistrate, is a fact made material by the statute, and that proof of it is a necessary preliminary to the right of introducing it at the trial. But it is supposed that sufficient may be gathered by intendment from the certificate of the magistrate to justify the presumption that it was done. The certificate is in these words: "State of Tennessee, Dickson county, ss. At Charlotte, in said county, on the 4th day of July, 1822, before me, James M. Ross, justice of the peace, and one of the judges of the county court of Dickson county, came, personally, John Mockbee, being about the age of fifty-one years, and after being carefully examined and cautioned, and sworn, to testify the whole truth, did subscribe the foregoing and annexed deposition, after the same was reduced to writing, by him in his own proper hand." The certificate then proceeds to state the reason for taking the deposition, &c., in the usual form. It is remarkable that the certificate follows throughout, with great exactness of terms, every requisition in the statute, with the exception as to the deposition being reduced to writing in the presence of the magistrate; and it is scarcely presumable that this was accidentally omitted. At all events, every word in the certificate may be perfectly true, and yet, the deposition may not have been reduced to writing in the magistrate's presence. If this be so, then there can arise no just presumption in favor of it. And we think, in a case of this nature, where evidence is sought to be admitted contrary to the rules of the common law, something more than a mere presumption should exist that it was rightly taken. There ought to be direct proof that the requisitions of the statute have been fully complied with. We are, therefore, of opinion that the deposition was properly rejected.

The more important question in the cause, is that relative to the evidence introduced to repel the plea of the statute of
[* 357] * limitations. In the course of the trial, the plaintiff read to the jury certain articles of copartnership, made between the defendants, in March, 1810, whereby the defendants entered into a joint trade and partnership in the manufacturing of salt, at a place known by the name of the United States Saline, near the Wabash River, within the Illinois Territory, for the term of three years, then

next ensuing, under the style of Taylor, Wilkins, and Co. He also gave evidence that large quantities of iron castings had been sold and delivered by him to the company during the term of the copartnership. He then introduced the testimony of one Patterson Baine, who stated "that sometime in the year 1818 or 1819, the plaintiff, Bell, came to his house, in Lexington, and stated that he had again come up, to endeavor to get the amount of his account from the defendants. He requested the witness to go with the plaintiff to Col. Morrison's, (one of the defendants,) on that business. The witness went. The plaintiff and Morrison had a good deal of conversation on the subject of the plaintiff's account against the Saline Company, for metal furnished, which is not recollected by the witness. The witness recollects that Morrison stated that the books and papers relative to the plaintiff's claim were in the hands of Jonathan Taylor, (one of the defendants,) which put it out of his power to settle the account at that time, and expressed a willingness, but for that reason, to settle with the plaintiff. The plaintiff bade him goodby, and declared that that was the last time he should ever apply for a settlement of his account. The plaintiff then left the house of Morrison, and returned with the witness to his house, where he remained until after breakfast on the next day; that shortly after breakfast, Morrison came to the house of the witness, and said to Bell, (the plaintiff,) that he was very anxious that his (the plaintiff's) account should be settled; adding, "I know we are owing you, and I am anxious it should be settled." He then mentioned to the plaintiff that he (Morrison) was getting old, and did not like to have such things hanging over him, and wished to have the business settled, and to have done with it. He then proposed to give the plaintiff seven thousand dollars, and close the business. The plaintiff refused to take it, and they parted; that no account or papers of any kind were shown or produced by Bell, at the time of these conversations with Morrison; but he understood the conversations to relate to the claim for castings, furnished by him to the company of Taylor, Wilkins, and others. The witness observed to the plaintiff, after Morrison's departure, that he should have taken Morrison's offer; that "a half loaf is better than no bread." The plaintiff also introduced certain letters written by Morrison and Butler, (two of the defendants,) to him. The first was

*a letter from Morrison, dated 2d of October, 1814; and it [*358]
contains, among others, the following expressions: "I wish whatever is due to you should be paid; I have once more to ask you to follow the advice I am about to offer, viz: to come up here, without delay, (as Col. Butler may be soon ordered off,) and I cannot believe your present suit will answer any purpose," &c. &c. "It

is not our wish to keep from you whatever may be your just due. We have sent for the company books, some two or three weeks since; they will come to Louisville by water; and on your and Mr. Wheatley's being there, I have no doubt but your account can be adjusted, and that more to your satisfaction than it ever can be from the result of your suit," &c. "I wish your account settled, and I have no hesitation in saying, on your coming here, it will be done." The next was a letter from Butler, dated 26th of October, 1817, in which he informs the plaintiff, that, on the 20th of November, Messrs. Morrison and Wilkins will be at Hopkinsville, "for the purpose of adjusting some of the affairs of the old Saline Company," &c.; and desires that he "will be present, in order that a settlement may be effected, if possible, of the account which you (he) set up against the company." The next is from Butler, dated the 8th of November, 1817, again mentioning the intended meeting on the 20th of November, "for the purpose of adjusting our old account with you;" and he adds: "I hope, therefore, you will be at Hopkinsville, for the purpose of enabling us to settle this old affair, to which, I am sure, all must be most anxious." The next is from Butler, dated the 23d of October, 1818, in which he alludes to a complaint made by the plaintiff, of Butler's absence from home on the 5th of the same month, when the plaintiff called there, and reminds the plaintiff of a conversation they had at the Greenville Springs, "about a day of meeting to adjust the account between the former Saline Company and yourself," and excuses himself for his absence. He adds: "I have now, sir, attended at three places, upon three appointments made by yourself and myself, without being able to have a meeting, &c. If it would suit you to be at Frankfort, during the sitting of the legislature, we might possibly come to some understanding on the subject." The next is a letter from Jonathan Taylor, (one of the defendants,) to the plaintiff, dated the 13th of March, 1818, in which he says: "I received a letter last Monday from Col. Butler, inviting me to attend an appointment with you at Hopkinsville, on the 26th of this month, for the purpose of adjusting the old company account. I shall endeavor to attend at that time, when, if we can make an arrangement, equally mutual, for the metal I may hereafter want, it can be done." Other
[*359] letters *of Taylor were read in evidence, but they all bear date in the years 1811 and 1812.

It was further proved that the plaintiff was present in 1814, when the Saline and improvements were delivered over to Bates, the succeeding lessee; and that the plaintiff was then apprised that the term of the defendants as lessees had terminated. After the evidence on the part of the plaintiff was closed, the defendants' counsel

moved the court to exclude the testimony of Patterson Baine, and all the letters bearing date within five years before the bringing of this suit, offered by the plaintiff to show a promise on the part of the defendants, or any one of them, or any member of said firm or partnership, within five years next before the commencement of this suit; and the court so excluded from the jury the evidence of the said Baine, and all the letters dated within five years aforesaid, tending to prove a promise in five years next before the commencement of this suit by the defendants, or either of them, or any member of said firm or partnership, as prayed by the defendants' counsel; and decided that "there was no sufficient evidence or admissions by the defendants, or either of them, or any member of said firm or partnership, to prove such a promise in five years before the commencement of this suit as would take the case out of the statute of limitations, or should be left to a jury as conducing to that effect." To which opinion of the court the plaintiff filed his bill of exceptions; and the correctness of this opinion has constituted the main ground of the elaborate argument at this bar.

Two points are necessarily involved in the discussion of this opinion. The first is, whether the evidence so excluded, (supposing it to be in all other respects unobjectionable,) was competent in point of law to have been left to the jury to infer a promise sufficient to take the case out of the statute of limitations. The second is, whether, supposing it would be competent in ordinary cases, the fact that it was the acknowledgment or promise of one partner, after the dissolution of the partnership, did not justify its exclusion as incompetent evidence to bind the other partners.

The statute of limitations of Kentucky is substantially the same with the statute of 21 of James, c. 16, with the exception that it substitutes the term of five years instead of six. The English decisions have, therefore, been resorted to upon the present occasion as illustrative of the true construction of the statute, and in this view are doubtless entitled to great consideration. They are not, however, and cannot be considered as conclusive authority upon the construction of the statute passed by a State upon the like subject; for this justly belongs to the local state tribunals, whose rules of interpretation *must be presumed to be founded upon a [*360] more just and accurate view of their own jurisprudence, than those of any foreign tribunal, however respectable. If therefore, upon examination, it shall be found that the doctrines of the Kentucky courts, upon this subject, are irreconcilable with those deduced from the statute of James, this court would, in conformity with its general practice, follow the local law, and administer the same jus-

tice which the state court would administer between the same parties.

It has often been matter of regret in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavorable light, as an unjust and discreditable defence, it had received such support as would have made it what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has manifest tendency to produce speedy settlements of accounts, and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions, (a species of evidence which, it has been often observed, it is hard to disprove, and easy to fabricate,) applicable to such remote times, as may leave no means to trace the nature, extent, or origin of the claim, and thus open the way to the most oppressive charges. If we proceed one step further, and admit that loose and general expressions, from which a probable or possible inference may be deduced of the acknowledgment of a debt, by a court or jury; that, as the language of some cases has been, any acknowledgment however slight, or any statement not amounting to a denial of the debt; that any admission of the existence of an unsettled account, without any specification of amount or balance, and however indeterminate and casual, are yet sufficient to take the case out of the statute of limitations, and to let in evidence *aliunde* to establish any debt, however large, and at whatever distance of time; it is easy to perceive that the wholesome objects of the statute must be in a great measure defective; and the statute virtually repealed.

The English decisions upon this subject have gone great lengths; greater, indeed, in our judgment, than any sound interpretation of the statute will warrant; and in some instances to an ex-
[*361] tent which is irreconcilable with any just principle. *There appears, at present, a disposition on the part of the English courts to retrace their steps; and, as far as they may, to bring back the doctrine to sober and rational limits. The American courts have evinced a like disposition. In the recent case of Bangs v. Hall, 2 Pick. 368, the principal cases were reviewed by the supreme court of Massachusetts; and it was held, that to take a case out of the statute there must be an unqualified acknowledgment, not only of the

debt as originally due, but that it continues so; and, if there has been a conditional promise, that the condition has been performed. A doctrine quite as comprehensive has been asserted in the supreme court of New York. The subject was much considered in the case of Sands *v.* Gelston, 15 Johns. 511, where Mr. Chief Justice Spencer, in delivering the opinion of the court, said: "That if at the time of the acknowledgment of the existence of the debt, such acknowledgment is qualified in a way to repel the presumption of a promise to pay, it will not be evidence of a promise sufficient to revive the debt, and take it out of the statute." In consonance with this principle the same court has held, that "if the acknowledgment be accompanied with a declaration that the party intends to rely on the statute as a defence, such an acknowledgment is wholly insufficient." See also Brown *v.* Campbell, 1 Serg. & Rawle, 176; Fries *v.* Boiselet, 9 Serg. & Rawle, 128. In the case of Clementson *v.* Williams, 8 C. 72, this court expressed the opinion that the decisions on this subject had gone full as far as they ought to be carried, and that the court was not inclined to extend them; that the statute of limitations was entitled to the same respect with other statutes, and ought not to be explained away. In that case an attempt was made to charge a partnership, by an acknowledgment made after its dissolution by one of the partners, when an account was presented to him, that "the account was due, and he supposed it had been paid by the other partner, but he had not paid it himself, and did not know of its being ever paid." It was held that this was not a sufficient acknowledgment to take the case out of the statute. The Chief Justice, in delivering the opinion of the court, said: "In this case there is no promise, conditional or unconditional, but a simple acknowledgment. This acknowledgment goes to the original justice of the account. But this is not enough. The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not sufficient to take the case out of the act, that the claim should be proved, or be acknowledged * to have been [* 362] originally just; the acknowledgment must go to the fact that it is still due."

In the case of Wetzell *v.* Bussard, 11 W. 309, the subject again came before this court; and the English and American authorities were deliberately examined. The court there expressly held, that "an acknowledgment which will revive the original cause of action must be unqualified and unconditional. It must show, positively, that the debt is due, in whole or in part. If it be connected with circum-

stances which in any manner affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or, if it be construed to revive the original debt, that revival is conditional, and the performance of the condition or a readiness to perform it must be shown."

We adhere to the doctrine thus stated, and think it the only exposition of the statute which is consistent with its true object and import. If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions are annexed, they ought to be shown to be performed.

If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations, and betrayed by perjuries.

It may be that in this manner an honest debt may sometimes be lost, but many unfounded recoveries will be prevented; and viewing the statute in the same light in which it was viewed by English judges at an early period, as a beneficial law, on which the security of all men depends, we think its provisions ought not to be lightly overturned; and that no creditor has a right to complain of a strict construction, since it is only by his own fault and laches, that it can be brought to bear injuriously upon him. And, if the early interpretation had been adhered to, that nothing but an express promise
[*363] should take *a case out of the statute, it is far from being certain that it would not have generally been in promotion of justice.

But the present case is not left to be determined solely upon general principles and authorities. There is a series of decisions of the Kentucky courts, upon the construction of their own statute of limitations, which, if they differed from those of other courts, would, as matter of local law, govern this court upon the present occasion. In the construction of local statutes, we have been in the habit of respecting and following the judgments of the local tribunals.

The first and leading case is Bell *v.* Rowland's administrators, in Hardin's Rep. 301. In that case the defendant made an acknowledgment, "that he had once owed the plaintiff, but he supposed his brother had paid it in Virginia, (the place where the original transaction took place, in the year 1785;) and, if his brother had not paid it, he owed it yet." The court held that the acknowledgment was not sufficient to take the case out of the statute; that the defendant was not bound to prove that his brother had not paid the debt; that the law would imply a promise only where the party ought to promise; and that the defendant ought not to have promised, under the circumstances of that case, to pay a debt which he supposed to be paid. But the general reasoning of the court, which is drawn up with great clearness and force, goes much further. The court said that the English decisions were not obligatory upon them, in the construction of their own statute, although similar in its provisions to the English statute; and that so far as they had gone upon nice refinements, for the purpose of evading the statute, they must be disregarded. "If the slightest acknowledgment; if strained, constructive acknowledgments and promises, are held sufficient, it must multiply litigation, produce endless uncertainty, and, it is to be feared, a fruitful crop of perjuries.

Slight circumstances and a man's loose expressions would be construed into a full acknowledgment of the debt, when he himself neither intended to make nor understood himself as making any acknowledgment at all. Instances of this sort are frequent in the books, but the example is too dangerous to be countenanced. And the court further declared: "Upon the whole, we are of opinion that the only safe rule that can be adopted, capable of any reasonable certainty is, that, in order to take the case out of the statute of limitations, an express acknowledgment of the debt, as a debt due at the time, coupled with the original consideration, or an express promise to pay it, must be proved to have been made, within the time prescribed by the statute."

There was another point in the case deserving of notice, [*364]
* which was, whether the court ought to have instructed the jury as to the law of the case, and then have left it with them to determine whether an acknowledgment of the debt, and a promise to pay it, had been proved to have been made within the five years; upon which it was held that it was competent for the court either to do so, or, (as it did in that case,) taking the whole of the evidence on the part of the plaintiff as true, and the facts sworn to by the witnesses as sufficiently proved, to instruct the jury as to the law arising upon those facts.

This case has never been departed from in Kentucky, and has been frequently recognized. In Harrison *v.* Handley, 1 Bibb, 443, the plaintiff, to take the case out of the statute, produced a witness who swore "that some time in May or June, 1796, he presented an account to W. H. (the defendant,) amounting to £250 or £260; that H. objected to certain articles in the said account, and after the said articles were stricken out of the account, H. then acknowledged it was all right. The court below ruled that this was such an acknowledgment as took the case out of the statute, but the decision was reversed by the court of appeals. Mr. Chief Justice Bibb, in delivering the opinion of the court, adverted to the case of Bell *v.* Rowland's administrators, and recognized its authority in the fullest terms. And after expressing a doubt whether an implied promise would not be barred by the statute, he proceeded to say: "Be that as it may, mere loose expressions and vague acknowledgments will not suffice. The acknowledgment from which the law is to raise a promise contrary to the provisions of the statute, must be clear and express, where the mind is brought directly to the point, debt or no debt, at the present time; not whether the debt was once an existing debt. That the law will argumentatively make it a debt *in præsenti*, if the party does not in his acknowledgment say it is not, or prove payment, is a proposition that cannot be granted in opposition to the provisions of the statute. Where the limitation has run, to get clear of it, the whole burden of proof is thrown on the plaintiff to prove a good and subsisting debt, and a promise to pay within the period prescribed to his action. The acknowledgment of H. does not come up to this requisition. There was no express promise to pay; there was no express acknowledgment of a then subsisting debt; there was no assent to pay. "H. then acknowledged the amount was all right," is too loose, vague, and indefinite an acknowledgment to revive a transaction, and put it under investigation again after the law had closed it. That the amount was right could be true, and might well be acknowledged, if the articles had been truly noted, notwith-
[*365] standing * the party might have paid it or was unwilling to acknowledge it as a debt then subsisting; and that is the point to which an express acknowledgment should have been proved." This is certainly a very strong case to illustrate the rule adopted in Kentucky.

In Gray *v.* Lawridge, 2 Bibb, 284, it was proved on the trial that the party had admitted the justice of the account within five years, and that it might go in discharge of the interest due on a bond of the defendant, on which the suit was brought by the plaintiff. The witness did not know the particular items of the account, nor the

amount thus acknowledged by the plaintiff. The court held that the acknowledgment did not go further than that the demand should be allowed in payment of the interest; and that so much as the party could show of a debt due to him, not exceeding the amount of the interest then due, was taken out of the statute, and no further. In Ormsby *v.* Letcher, 3 Bibb, 269, it was decided that an agreement of the defendant within five years, that a settlement made with the brother of the defendant should be subject to the examination of either party, did not take the case out of the statute. It may be inferred that it was a settlement of accounts between the parties, and that the action was brought for the balance due to the plaintiff; although the report does not so state. The court said: "this agreement does not contain an acknowledgment of a subsisting demand, and a promise to pay in consideration thereof." The language of this case, as well as that in Harrison *v.* Handley, might lead to the impression that the court thought that an acknowledgment of a subsisting debt was not alone sufficient; but that there must be also a promise to pay the debt. But perhaps it is more correct to construe it as importing no more than that there must be such an acknowledgment, coupled with circumstances, from which a promise to pay would naturally and irresistibly be implied.

These are all the decisions which we have met with in the Kentucky Reports on this point. They evince a strong disposition in the courts of that State to restrict, within very close limits, every attempt to revive debts by implied promises resulting from acknowledgments and other confessions by parol. It is our duty to follow out the spirit of these decisions, so far as we are enabled to gather the principles on which they are founded, and to apply them to the case at bar.

The evidence, in the case at bar, resolves itself into two heads: first, whether the admission of a party of the existence of an unliquidated account, on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time from which it can be ascertained what the *parties [*366] understood the balance to be, is sufficient to take the case out of the statute, and let in the plaintiff to prove, *aliunde*, any balance, however large it may be; secondly, if not, whether the admission on the part of Morrison, of his willingness to pay $ 7,000, and close the business, might, under all the circumstances, entitle the plaintiff to recover that amount, and thus to furnish a just objection to the ruling of the circuit court.

In both of these views the case is not without its difficulties; and the Kentucky decisions present no authority directly in point.

The evidence is clear of the admission of an unsettled account, as well from the letters of Butler, as the conversation of Morrison. The latter acknowledged that the partnership "was owing" the plaintiff; but as he had not the books, he could not settle with him. If this evidence stood alone, it would be too loose to entitle the plaintiff to recover anything. The language might be equally true, whether the debt were one dollar or ten thousand dollars. It is indispensable for the plaintiff to go further, and to establish, by independent evidence, the extent of the balance due him, before there can arise any promise to pay it as a subsisting debt. The acknowledgment of the party, then, does not constitute the sole ground of the new implied promise; but it requires other intrinsic aid before it can possess legal certainty. Now, if this be so, does it not let in the whole mischief intended to be guarded against by the statute? Does it not enable the party to bring forward stale demands after a lapse of time, when the proper evidence of the real state of the transaction cannot be produced? Does it not tend to encourage perjury, by removing the bar upon slight acknowledgments of an indeterminate nature? Can an admission that something is due, or some balance owing, be justly construed into a promise to pay any debt or balance which the party may assert or prove before a jury? If there be an express promise to such an effect, that might be pressed as a dispensation with the statute; but the question here is, whether the law will imply such a promise from language so doubtful and general. The language of the court, in Harrison *v.* Hanley, was, that "mere loose expressions or vague acknowledgments will not suffice." We think that such a general admission of an unsettled account, and of an indeterminate debt, would by the courts of Kentucky be held as too vague an acknowledgment to take the case out of the statute. It would not establish any particular subsisting debt, and therefore be destitute of reasonable certainty to raise an implied promise.

The other point is also not without its embarrassments. Was Morrison's offer of $ 7,000, to close the business, the abso-
[*367] lute admission of a debt to that amount, or a *conditional promise to pay that sum, if the party would accept it in discharge of his claims? We think, taking all the circumstances, it scarcely admits of the former interpretation. It appears from the testimony itself, that Morrison did not know the state of the partnership accounts, and had not the partnership books to enable him to ascertain it. He also expressed a personal reason for his desire to settle the account, alleging that he was growing old, and was anxious for a settlement. His offer must therefore be deemed to be in the nature

of a compromise, to pay the sum if the plaintiff would give a complete discharge of his claims; or, to use his own words, "and close the business." It may therefore be fairly deemed a conditional offer to pay a conjectural, not a known balance; to buy peace, and not to acknowledge an absolute debt. If this be, as we think it is, a conditional offer, then, upon the clear text of the Kentucky, as well as the English, and of other American decisions, the case would not be taken out of the statute, unless the plaintiff had performed the condition.

But, if this view of the case should be more doubtful than it seems to us to be, it still remains to consider whether the acknowledgment of one partner, after the dissolution of the copartnership, is sufficient to take the case out of the statute as to all the partners. How far it may bind the partner making the acknowledgment to pay the debt, need not be inquired into; to maintain the present action, it must be binding upon all.

In the case of Bland *v.* Haselrig, 2 Vent. 151, where the action was against four, upon a joint promise, and the plea of the statute of limitations was put in, and the jury found that one of the defendants did promise within six years, and that the others did not; three judges, against Ventris, J., held that the plaintiff could not have judgment against the defendant who had made the promise. This case has been explained upon the ground that the verdict did not conform to the pleadings, and establish a joint promise. It is very doubtful, upon a critical examination of the report, whether the opinion of the court, or of any of the judges, proceeded solely upon such a ground.

In Whitcomb *v.* Whiting, 2 Doug. 652, decided in 1781, in an action on a joint and several note brought against one of the makers, it was held that proof of payment, by one of the others, of interest on the note and of part of the principal, within six years, took the case out of the statute, as against the defendant who was sued. Lord Mansfield said: "Payment by one is payment for all, the one acting virtually for all the rest; and in the same manner an admission by one is an admission by all, and the law raises the promise to pay, when the debt is admitted to be due." This is the whole reasoning *reported in the case, and is certainly not [*368] very satisfactory. It assumes that one party who has authority to discharge, has, necessarily, also authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists, by analogy, to charge the whole. Now this very position constitutes the matter in controversy. It is true that a payment by one does enure for the benefit of the whole;

but this arises not so much from any virtual agency for the whole, as by operation of law; for the payment extinguishes the debt; if such payment were made after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor could no longer sue them. In truth, he who pays a joint debt pays to discharge himself; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them in contribution without such payment has been rightfully made and ought to charge them.

When the statute has run against a joint debt, the reasonable presumption is, that it is no longer a subsisting debt; and, therefore, there is no ground on which to raise a virtual agency to pay that which is not admitted to exist. But, if this were not so, still, there is a great difference between creating a virtual agency, which is for the benefit of all, and one which is onerous and prejudicial to all. The one is not a natural or necessary consequence from the other. A person may well authorize the payment of a debt for which he is now liable; and yet refuse to authorize a charge where there at present exists no legal liability to pay. Yet, if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt at the time when such acknowledgment was made.

The doctrine of Whitcomb *v.* Whiting has been followed in England in subsequent cases, and was applied in a strong manner in Jackson *v.* Fairbank, 2 H. Bl. 340, where the admission of a creditor to prove a debt on a joint and several note under a bankruptcy, and to receive a dividend, was held sufficient to charge a solvent joint-debtor, in a several action against him, in which he pleaded the statute as an acknowledgment of a subsisting debt. It has not, however, been received without hesitation. In Clarke *v.* Bradshaw, 3 Esp. 155, Lord Kenyon, at *Nisi Prius*, expressed some doubts upon it; and the cause went off on another ground. And in Brandram *v.* Wharton, 1 Barn. & Ald. 463, the case was very much shaken, if not overturned. Lord Ellenborough, upon that occasion, used language from which his dissatisfaction with the whole doctrine may be clearly inferred. "This doctrine," said he, "of rebutting the [* 369] statute of limitations by an acknowledgment other * than that of the party himself, begun with the case of Whitcomb *v.* Whiting. By that decision, where, however, there was an express acknowledgment by an actual payment of a part of the debt by one of the parties, I am bound. But that case was full of hardship; for this inconvenience may follow from it. Suppose a person liable jointly with thirty or forty others to a debt, he may have actually

paid it, may have had in his possession the document by which that payment was proved, but may have lost his receipt. Then, though this was one of the very cases which this statute was passed to protect, he may still be bound, and his liability be renewed, by a random acknowledgment made by some one of the thirty or forty others who may be careless of what mischief he is doing, and who may even not know of the payment which has been made. Beyond that case, therefore, I am not prepared to go, so as to deprive a party of the advantage given him by the statute by means of an implied acknowledgment."

The English cases decided since the American Revolution are, by an express statute of Kentucky, declared not to be of authority in their courts, and, consequently, Whitcomb *v.* Whiting, in Douglas, and the cases which have followed it, leave the question in Kentucky quite open to be decided upon principle.

In the American courts, so far as our researches have extended, few cases have been litigated upon this question. In Smith's Adm. *v.* D. and G. Ludlow, 6 Johns. 267, the suit was brought against both partners, and one of them pleaded the statute. Upon the dissolution of the partnership, public notice was given that the other partner was authorized to adjust all accounts, and an account signed by him, after such advertisement, and within six years, was introduced. It was also proved that the plaintiff called on the partner who pleaded the statute before the commencement of the suit, and requested a settlement, and that he then admitted an account, dated in 1797, to have been made out by him; that he thought the account had been settled by the other defendant, in whose hands the books of the partnership were, and that he would see the other defendant on the subject, and communicate the result to the plaintiff. The court held that this was sufficient to take the case out of the statute, and said that, without any express authority, the confession of one partner after the dissolution will take a debt out of the statute. The acknowledgment will not * of itself be evidence of an original debt; for [* 370] that would enable one party to bind the other in new contracts. But the original debt being proved or admitted, the confession of one will bind the other, so as to prevent him from availing himself of the statute. This is evident from the cases of Whitcomb *v.* Whiting, and Jackson *v.* Fairbank; and it results necessarily from the power given to adjust accounts. The court also thought the acknowledgment of the partner setting up the statute, was sufficient of itself to sustain the action. This case has the peculiarity of an acknowledgment made by both partners, and a formal acknowledgment by the partner who was authorized to adjust the accounts after

the dissolution of the partnership. There was not, therefore, a virtual, but an express and notorious agency, devolved on him to settle the account. The correctness of the decision cannot, upon the general view taken by the court, be questioned. In Roosevelt *v.* Marks, 6 Johns. 266, 291, Mr. Chancellor Kent admitted the authority of Whitcomb *v.* Whiting, but denied that of Jackson *v.* Fairbank, for reasons which appear to us solid and satisfactory. Upon some other cases in New York we shall have occasion hereafter to comment. In Hunt *v.* Bridgham, 2 Pick. 581, the supreme court of Massachusetts, upon the authority of the cases in Douglas, H. Blackstone, and Johnson, held that a partial payment by the principal debtor on a note, took the case out of the statute of limitations, as against a surety. The court do not proceed to any reasoning to establish the principle, considering it as the result of the authorities. Shelton *v.* Cocke, 3 Mumford, 191, is to the same effect, and contains a mere annunciation of the rule, without any discussion of its principle. Simpson *v.* Geddes, 2 Bay, 533, proceeded upon a broader ground, and assumes the doctrine of the case in 1 Taunt. 104, hereinafter noticed, to be correct. Whatever may be the just influence of such recognitions of the principles of the English cases in other States, as the doctrine is not so settled in Kentucky, we must resort to such recognition only as furnishing illustrations to assist our reasoning, and decide the case now as if it had never been decided before.

By the general law of partnership, the act of each partner, during the continuance of the partnership, and within the scope of its objects, binds all the others. It is considered the act of each and of all, resulting from a general and mutual delegation of authority. Each partner may, therefore, bind the partnership by his contracts in the partnership business, but he cannot bind it by any contracts beyond those limits. A dissolution, however, puts an end to the authority. By the force of its terms it operates as a revocation [*371] of all power to create new contracts, * and the right of partners as such can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds. Even this right may be qualified and restrained by the express delegation of the whole authority to one of the partners.

The question is not, however, as to the authority of a partner after the dissolution to adjust an admitted and subsisting debt; we mean, admitted by the whole partnership, or unbarred by the statute; but whether he can, by his sole act, after the action is barred by lapse of time, revive it against all the partners, without any new authority communicated to him for this purpose. We think the proper resolution of this point depends upon another, that is, whether the acknowl-

edgment or promise is to be deemed a mere continuation of the original promise, or a new contract, springing out of and supported by the original consideration. We think it is the latter, both upon principle and authority; and if so, as after the dissolution no one partner can create a new contract binding upon the others, his acknowledgment is inoperative and void as to them.

There is some confusion in the language of the books, resulting from a want of strict attention to the distinction here indicated. It is often said that an acknowledgment revives the promise, when it is meant that it revives the debt or cause of action. The revival of a debt supposes that it has been once extinct and gone; that there has been a period in which it had lost its legal use and validity. The act which revives it is what essentially constitutes its new being, and is inseparable from it. It stands, not by its original force, but by the new promise, which imparts vitality to it. Proof of the latter is indispensable to raise the *assumpsit* on which an action can be maintained. It was this view of the matter which first created the doubt whether it was not necessary that a new consideration should be proved to support the promise, since the old consideration was gone. That doubt has been overcome, and it is now held that the original consideration is sufficient, if recognized, to uphold the new promise, although the statute cuts it off as a support for the old. What, indeed, would seem to be decisive on this subject is, that the new promise, if qualified or conditional, restrains the rights of the party to its own terms; and if he cannot recover by those terms, he cannot recover at all. If a person promise to pay upon condition that the other do an act, performance must be shown before any title accrues. If the declaration lays a promise by or to an intestate, proof of the acknowledgment of the debt by or to his personal representative, will not maintain the writ. Why not, since it establishes the continued existence of the *debt? The plain reason is, [*372] that the promise is a new one, by or to the administrator himself, upon the original consideration, and not a revival of the original promise. So, if a man promises to pay a preëxisting debt, barred by the statute, when he is able, or at a future day, his ability must be shown, or the time must be passed before the action can be maintained. Why? Because it rests on the new promise, and its terms must be complied with. We do not here speak of the form of alleging the promise in the declaration, upon which, perhaps, there has been a diversity of opinion and judgment, but of the fact itself, whether the promise ought to be laid in one way or another, as an absolute or as a conditional promise, which may depend upon the rules of pleading.

This very point came before the twelve judges in the case of Hyleing v. Hastings, 1 Ld. Raym. 389, 421, in the time of Lord Holt. There one of the points was, "Whether the acknowledgment of a debt within six years would amount to a new promise, to bring it out of the statute; and they were all of opinion that it would not, but that it was evidence of a promise." Here, then, the judges manifestly contemplated the acknowledgment, not as a continuation of the old promise, but as evidence of a new promise; and that it is the new promise which takes the case out of the statute. Now, what is a new promise, but a new contract? a contract to pay, upon a preëxisting consideration, which does not, of itself, bind the party to pay, independently of the contract? So in Boydell v. Drummond, 2 Campb. 157, Lord Ellenborough, with his characteristic precision, said: "If a man acknowledges the existence of a debt barred by the statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived." And it may be affirmed that the general current of the English, as well as the American authorities, conforms to this view of the operation of an acknowledgment. In Jones v. Moore, 5 Binney, 573, Mr. Chief Justice Tilghman went into an elaborate examination of this very point, and came to the conclusion, from a review of all the cases, that an acknowledgment of the debt can only be considered as evidence of a new promise; and, he added: "I cannot comprehend the meaning of reviving the old debt in any other manner than by a new promise."

There is a class of cases not yet adverted to, which materially illustrates the right and powers of partners after the dissolution of the partnership, and bears directly on the point under consideration. In Hackley v. Patrick, 3 Johns. 536, it was said by the court that, "after a dissolution of the partnership, the power of one party to bind the others wholly ceases. There is no reason why his [* 373] acknowledgment of an account * should bind his copartners any more than his giving a promissory note in the name of the firm, or any other act." And it was, therefore, held, that the plaintiff must produce further evidence of the existence of an antecedent debt before he could recover, even though the acknowledgment was by a partner authorized to settle all the accounts of the firm. This doctrine was again recognized by the same court, in Walden v. Sherburne, 15 Johns. 409, 424; although it was admitted that, in Wood v. Braddick, 1 Taunt. 104, a different decision had been had in England. If this doctrine be well founded, as we think it is, it furnishes a strong ground to question the efficacy of an acknowledgment to bind the partnership for any purpose. If it does

not establish the existence of a debt against the partnership, why should it be evidence against it at all? If evidence *aliunde* of facts within the reach of the statute, as the existence of a debt, be necessary before the acknowledgment binds, is not this letting in all the mischiefs against which the statute intended to guard the parties, namely, the introduction of stale and dormant demands, of long standing and of uncertain proof? If the acknowledgment, *per se*, does not bind the other partners, where is the propriety of admitting proof of an antecedent debt, extinguished by the statute as to them, to be revived without their consent? It seems difficult to find a satisfactory reason why an acknowledgment should raise a new promise, when the consideration upon which alone it rests, as a legal obligation, is not coupled with it in such a shape as to bind the parties; that the parties are not bound by the admission of the debt as a debt, but are bound by the acknowledgment of the debt as a promise, upon extrinsic proof. The doctrine in 1 Taunt. 104 stands upon a clear, if it be a legal ground; that, as to the things past, the partnership continues and always must continue, notwithstanding the dissolution. That, however, is a matter which we are not prepared to admit, and constitutes the very ground now in controversy.

The light in which we are disposed to consider this question is, that after a dissolution of a partnership no partner can create a cause of action against the other partners, except by a new authority, communicated to him for that purpose. It is wholly immaterial what is the consideration which is to raise such cause of action; whether it be a supposed preëxisting debt of the partnership, or any auxiliary consideration which might prove beneficial to them. Unless adopted by them, they are not bound by it. When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. The acknowledgment, if it is to operate at all, is to * create a new cause of action; to revive a debt [* 374] which is extinct; and thus to give an action which has its life from the new promise implied by law from such an acknowledgment, and operating and limited by its purport. It is, then, in its essence, the creation of a new right, and not the enforcement of an old one. We think that the power to create such a right does not exist, after a dissolution of the partnership, in any partner.

There is a case in the Kentucky Reports, not cited at the bar, which coincides, as far as it goes, with our own views; and, if taken as a general exposition of the law according to its terms, is conclusive on this point. It is the case of Walker and Evans *v.* Duberry, 1 Marshall, 189. It is very briefly reported, and the opinion of the court was as follows: "We are of opinion that the court below

improperly admitted as evidence against Walker the certificate of J. T. Evans, made after the dissolution of the partnership, between Walker and Evans, acknowledging that the partnership firm was indebted to the defendant, Duberry, in the sum demanded in the action brought by him in the court below. It cites 3 Johns. 536; 3 Munf. 191.

It does not appear what was the state of facts in the court below, nor whether this was an action in which the statute of limitations was pleaded, or only *non assumpsit* generally. But the position is generally asserted, that the acknowledgment of a debt by one partner after a dissolution is not evidence against the other. Whether the court meant to say in no case whatever, or only when the debt itself was proved *aliunde*, does not appear. Its language is general, and would seem to include all cases; and, if any qualification were intended, it would have been natural for the court to express that qualification, and have confined it to the circumstances of the case. The only room for doubt arises from the citations of 3 Johnson and 3 Munford. The former has been already adverted to; and the latter, Shelton *v.* Cocke et al. 3 Munf. 191, recognized the distinction asserted in 3 Johns. as sound. These citations may, however, have been referred to as mere illustrations, going to establish the proposition of the court to a certain extent, and not as limitations of its extent. In any view, it leads to the most serious doubts, whether the state courts of Kentucky would ever adopt the doctrine of Whitcomb *v.* Whiting, in Douglas; especially so, as the early case in 2 Vent. 151, carries an almost irresistible presumption that the courts, at that time, held a doctrine entirely inconsistent with the case in Douglas.

Upon the whole, it is our judgment that there is no error in the decision of the circuit court, and it ought to be affirmed.

[* 375] * It is, however, to be understood, that this opinion thus expressed is not unanimous, but of the majority of the court; and as is apparent from the preceding reasoning, it has been principally, although not exclusively, influenced by the course of decisions in Kentucky upon this subject.

Judgment affirmed, with costs.

3 P. 43, 99; 5 P. 604; 6 P. 86; 7 H. 693; 11 H. 375.

The Mechanics' Bank of Alexandria, Appellants, v. Adam Lynn, Appellee.

1 P. 376.

A judgment creditor agreed with his debtor to resort for payment to a fund created by a deed of trust, which, without the knowledge of the creditor, contained a limitation of time for parties to come in, and the time had expired; held, that the debtor could not enjoin the judgment without first enabling the creditor to come in under the deed.

If a bill charges notice, the defendant must answer without a special interrogatory; but is not bound to answer an interrogatory as to a fact not stated in the bill.

Appeal from the circuit court of the United States for the District of Columbia. The case is stated in the opinion of the court.

Wirt (attorney-general) and *Swann*, for the appellants.

Jones and *Taylor*, contrà.

* Thompson, J., delivered the opinion of the court. [* 381]

Adam Lynn, the complainant in the court below, filed his bill for an injunction to restrain the Mechanics' Bank of Alexandria from proceeding upon a judgment which it had recovered against him at law, for $1,573.85. A perpetual injunction was decreed, to reverse which the present appeal is brought.

The bill and answer contain many matters not necessary now to be noticed. The grounds upon which the application for an injunction was placed, were, that on the 29th of May, 1821, a settlement was made between the parties, of various matters which had been for a long time in dispute between them, among which was the judgment now in question. In the account stated, which formed the basis of that settlement, Lynn is charged with this judgment, which is there called "the overdraw," and credited by security in deed to Mason for the same. Upon this statement of the account, there was a balance of $3,700 found in favor of the bank, for which security was to be given. This may, however, be now laid out of view. For although it appears that some difficulty arose with respect to the security for this balance, yet it is alleged in the bill that * it was afterwards paid to the bank; and this [* 382] is not denied, but substantially admitted in the answer. And the whole arrangement upon that settlement was carried into execution, except that which related to the judgment now in question.

It is contended, on the part of Lynn, that the security in the deed to Mason was a complete discharge by the bank of this debt. And, whether it is so to be considered, is the only question necessary now to be noticed.

The deed of trust given by Lynn to Mason, bears date the 16th of November, 1820; and provides in the first place for the payment of judgment creditors; then for certain enumerated creditors; and finally, the surplus to be paid to the Mechanics' Bank of Alexandria, in discharge of notes discounted for Lynn. This deed contains the following proviso: "Provided always, and it is hereby expressly required, that each and every of the aforesaid creditors, before they receive the benefit of this deed, shall sign and execute a full and complete discharge from all claims and demands whatever, against the said Adam Lynn. And the period of six months shall be and is hereby allowed them from the date of this instrument to come in, and elect and sign such discharge."

It will be seen from comparing the dates of this deed, and the settlement made between the parties, that the six months limited for the creditors to come in and accept of the provision thereby made, had expired when the settlement took place; and the bank, therefore, according to the terms of the deed, was precluded from taking any benefit under it.

The bill alleges that the provision made by the trust deed for the payment of this debt, was amply sufficient. The bank denies that the judgment has ever been satisfied, and alleges that on application to the trustee, Mason, for the benefit of the provision thereby made, it was refused, because the time had expired within which the creditors were to come in and accept of the benefit of it.

Was this then such a settlement and discharge of this judgment, as, under the circumstances, will conclusively bind the bank, and turn it over to this trust fund alone for satisfaction of the debt?

The complainant in the court below asks the aid of a court of chancery to restrain the bank from enforcing a judgment at law; and if this is an unconscientious request, it would be inconsistent with the course of a court of equity to grant it.

The complainant may be considered as asking the specific execution of an agreement, by which the bank stipulated to accept, in satisfaction of this judgment, the provisions made by Lynn for his creditors in the deed of trust.

[*383] *But the court ought not to decree performance, according to the letter, when from change of circumstances, mistake, or misapprehension, it would be unconscientious so to do. The court may so modify the agreement, as to do justice as far as circumstances will permit; and refuse specific execution, unless the party seeking it will comply with such modification as justice requires.

It cannot be presumed that the bank, in point of fact, knew that

the time had expired within which creditors were allowed to come in and accept of the trust fund. Nor ought it to be presumed that this circumstance was adverted to by Lynn, as it would be charging him with a fraudulent design of imposing upon the bank an unavailable security.

Whether it was available or not, is a proper subject of inquiry, under the pleadings. The bill alleges that the provision made by the deed for payment of this debt, was abundantly sufficient.

This the answer denies; because the complainant by the limitation of the time within which the creditors were to come in, had debarred the bank of availing itself of that security, and that the trustee had excluded this debt on that account. And all that the bank requires is, that the complainant should order his trustee, Mason, to pay this debt out of the trust fund.

It is said, however, that the bank is chargeable with notice of this deed, and all its provisions; and has therefore accepted the fund, at its own risk; and particularly as notice is not denied in the answer.

There is nothing in the pleadings or proofs showing notice in fact, and the deed was not recorded, so as to charge the bank with constructive notice. There may be reasonable grounds to conclude that the bank had information with respect to the trust fund, before it agreed to accept it as a substitute for the judgment. But actual knowledge of this limitation cannot reasonably be presumed, as it was a fund from which no benefit could be derived; and the bill contains no charge calling upon the bank for an admission or denial of notice. This was not required by reason of the special interrogatory put in the bill. If the bill had charged the bank with notice, an answer must have been given without such interrogatory. But a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill; Mitford, 44; and if the bank was called upon by this interrogatory to admit or deny notice, no answer having been given, exception should have been taken to the answer for insufficiency.

Nothing therefore appears, which would have precluded the * bank from the aid of a court of chancery; even was [* 384] its complainant seeking relief against the conclusive operation of this settlement, when the consideration for which the judgment was to be discharged has entirely failed, and that by the act of Lynn himself. But when the judgment debtor comes into the court asking protection on the ground that he has satisfied the judgment, the door is fully open for the court to modify or grant his prayer, upon such conditions as justice demands.

The arrangement between the parties was executory; no release

or discharge of the judgment was given. The account stated was the basis only on which the settlement was made and to be carried into execution. And it must have been the intention of both parties, that the bank should be let in to take the benefit of the trust fund. And justice requires that this should still be done, as far forth as it can be consistently with the safety of the trustee, and the rights of other creditors entitled to the benefit of that fund.

The situation of that fund, however, and what has been done under the trust deed, could not be properly inquired into, under the pleadings in this cause, and without other parties before the court.

The proper course for the bank would have been, to have filed a cross-bill against the complainant and such other parties as were necessary to bring that subject completely before the court, and enable it to make a final determination of the matter in dispute. If the assent of Lynn is all that is necessary to enable the bank to avail itself of the trust fund, justice requires that this should be given before the bank is entirely restrained from proceeding on its judgment at law. And it is no doubt within the legitimate powers of a court of chancery, under circumstances like the present, to require such assent and modification of the settlement, before granting a perpetual injunction.

But the rights of other creditors, which may have attached upon this fund, must not be lost sight of; with respect to which, however, we have not before us the means of judging.

We are accordingly of opinion that the decree of the court below granting a perpetual injunction be reversed; and that the cause be sent back with directions to the court to continue the injunction, until the bank has a reasonable time to file a cross-bill; and that the continuance of the injunction be subject to such further order of the court, as equity and justice may require.

This cause came on, &c.; on consideration whereof, it is decreed and ordered by this court that the decree of said circuit
[* 385] * court in this cause, granting a perpetual injunction, be and the same is hereby reversed and annulled; and it is further ordered by this court that the cause be remanded to the said circuit court, with directions to continue the injunction until the bank has a reasonable time to file a cross-bill, and that the continuance of such injunction be subject to such further orders of the court, as equity and justice may require.

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1 P. 386.

The borrower, upon *respondentia*, has a right to apply the money lent as he pleases; it does not vitiate the bond, that its proceeds were applied to pay a prior loan.

A *respondentia* loan, made during a voyage, is legal. If the risk is taken for the whole voyage, it is like that assumed by underwriters, who insure "lost or not lost."

Under the act of March 2, 1799, sec. 65, (1 Stat. at Large, 676,) the priority of the United States is a right to prior payment out of the funds in the hands of the assignees, and does not prevent the property assigned from vesting in them, nor does it affect a mortgage of part of the debtor's property made to secure a *bonâ fide* debt.

Equity does not treat a mortgage as a mere lien, but considers the mortgagee a trustee for the mortgagor.

If the consignor is the sole owner of the goods, he may pass the title to them by a bill of sale, good as against all persons save a *bonâ fide* indorsee of the bill of lading; and if such assignment be made of an outward cargo, the title attaches to its proceeds sent home.

Want of possession of goods assigned while at sea, due diligence to take possession on arrival having been used, or rendered useless, is not a badge of fraud.

In an action by a corporation, if the defendant would deny the corporate existence, he must do so by a plea in abatement.

A witness may be asked whether he was agent for the plaintiff, before any evidence of the manner of creating his agency.

Proof of the signature of one of the parties, to a joint and several bond, is sufficient to make title as against him.

THE facts bearing on the questions discussed and decided by the court are fully stated in the opinion. The instructions to the jury and the exceptions taken were as follows: —

*At the close of the argument to the court and jury on [* 397] the law and fact of the case, WASHINGTON, J., delivered the following points in charge to the jury.

1. That the bonds given by Edward Thomson to the plaintiffs, for securing the loans of $21,000, on the cargo of The Addison, and of $13,960, on that of The Superior, are not invalid as marine contracts, for the reason alleged by the counsel for the defendant; that is to say, because in respect to the former, the loan was made after The Addison had sailed upon her voyage, and in respect to the latter, for the same reason; and because the bond was given by the said Thomson for securing a balance due by him to the plaintiffs, on account of preceding loans made to him, and not for money lent at the time the said security was given.

2. That it is no objection to the validity of the bond given for securing the loan on the cargo of The Addison upon the ground of usury, that such cargo was known by the parties at the time the said bond was given to have been in safety at and upon the departure of the said vessel from Philadelphia; since the real question for the

jury to decide in relation to that subject was, whether, upon the whole of the evidence given in the cause, the loan was bottomed upon a fair marine contract, the repayment of which was to depend upon the perils which the plaintiffs assumed to bear, or whether the contract was merely a device to cover an usurious loan. If the risk be inconsiderable, or for a part of the voyage only, and the marine interest be disproportioned thereto, these circumstances may warrant the presumption of unfair conduct sufficient to avoid the contract. But the mere circumstance of the known safety of the cargo at any particular period of the voyage, or of the assumed risk, is not, *per se*, an objection to the contract on the ground of usury. If Edward Thomson was to pay interest from a period antecedent to the loan, there can be no question but that the contract was usuri-
[*398] ous, and it would be so although * no more than the legal rate of interest was reserved. How that fact is, the jury must decide from the evidence before them.

3. That the loan upon the cargo of The Addison was, by the terms of the aforesaid bond, given to secure it at the risk of the plaintiffs during the whole voyage, notwithstanding the omission of the words "lost or not lost" in the said bond; there being other and equivalent expressions in the said instrument.

4. That the above bond given for securing the loan made upon the cargo of The Addison, together with the memorandum indorsed on it, the bill of lading outward, and the indorsement thereon, are all to be considered as forming parts of one entire contract; and as such they do, upon a fair and legal construction of them, cover that part of the homeward cargo which was the investment of the outward cargo on which the loan was secured; and that the same principles are applicable to the contract in relation to The Superior. That the above instruments, taken and construed together as forming one contract, vested in the plaintiffs an equitable title to the return cargoes of those vessels; if, upon the evidence given in the cause, the jury should be of opinion that those return cargoes were in point of fact the investment of the outward cargoes of The Addison and Superior, respectively. And that nothing remained to be done to vest in the plaintiffs the legal right to the said property, respectively, but the delivery to them of the homeward bills of lading of The Addison's cargo, indorsed in blank, and an assignment to the plaintiffs by Mackie and Arny, of the homeward bills of lading of the cargo of The Superior.

5. That the equitable title of the plaintiffs so vested in them on the 19th day of November, 1825, when Edward Thomson made an assignment of all his property for the benefit of his creditors, was

not defeated or affected by the right of preference which that act gave to the United States, to be first paid what was due to them by the said Thomson, and that this equitable title was converted into a legal one, by the subsequent delivery to the plaintiffs of the bills of lading, indorsed in blank, of The Addison's homeward cargo, and of the assignment by Mackie and Arny, of those of the cargo of The Superior.

6. That the actual possession of the above return cargoes by the masters of The Addison and Superior, until they were levied upon under executions at the suit of the United States against Thomson, is not *per se*, in law, a badge of fraud, which ought to invalidate or affect the title of the plaintiffs to those cargoes.

7. That as to the charge of fraud, which it is insisted by the counsel for the defendant taints this transaction throughout, * that is a subject exclusively for the consideration and [*399] determination of the jury, upon the evidence laid before them, in deciding upon which they are to observe, First. That actual fraud must be proved, and ought not to be presumed; and, Second. That no fraud which may have been practised or attempted, by Edward Thomson, his captains or agents, ought to affect the validity of these contracts, unless they should be satisfied, from the evidence, that the plaintiffs, in some way or other, participated in the same.

8. That if the jury should be of opinion, upon the whole of the evidence, that the transactions between the plaintiffs and E. Thomson, which constitute the basis of this action, were fair, so far as the plaintiffs were concerned in them; and that they stand clear of the imputation of usury, on the ground that interest was reserved from a period antecedent to the loan; and if further they are satisfied that the homeward cargoes were the proceeds of the outward cargoes on which the securities were given; then their verdict ought to be for the plaintiff, otherwise not. It was further stated by the judge that he had declined giving a construction of the 62d [1] section of the act imposing duties, or an opinion on the question whether, under that section, the consignee of imported goods is liable for the duties on them, considering it to be unnecessary from the view which he had taken of the case.

And in explanation of the charge, the following questions were propounded by the counsel and answered by the court: —

1. The defendant's counsel requested the court to charge the jury that if the agreement of the plaintiffs with Edward Thompson was made with the view to deprive the United States of their duties, it

[1] 1 Stats. at Large, 673.

was fraudulent, and the plaintiffs could not recover. To which the judge answered, that if the agreement was made with that view, such would be the legal consequence; but that he had heard no evidence to warrant that conclusion in point of fact; but that was a subject exclusively for the jury.

2. The court was asked by the same counsel, to charge that if the contract of Edward Thomson with the defendant was to pay more than lawful interest during a period when there was no marine risk, the contract was usurious and void. To which the judge answered, that if the contract was a cover to charge more than lawful interest when there was no marine risk, it was usurious and void. That he did not himself understand the entries from the plaintiffs' books which had been given in evidence, but that the fact upon which the question is predicated, was proper for the decision of the jury.

3. The court was then asked by the plaintiffs' counsel, to charge that the parties were at liberty to agree for a marine interest greater than the legal rate for the time that the money [* 400] * was exposed to marine risks, or the loan was at hazard by the marine risk of the goods on which it was made. To which the judge answered, that they certainly were.

To all which the defendant's counsel excepted, and the judges sealed a bill of exceptions.

Ingersoll and *Wirt*, (Attorney-General,) for the plaintiff.

Binney and *Webster*, contrà.

[* 434] * Story, J., delivered the opinion of the court.

This is an action of trespass, *de bonis asportatis*, brought in the circuit court for the district of Pennsylvania, by the Atlantic Insurance Company, to recover against the defendant, John Conard, the marshal of that district, the value of certain teas shipped on board the ships Addison and Superior, and levied upon by him, upon an execution, in favor of the United States, against one Edward Thomson, as the property of the latter. The real question in the cause is, whether the insurance company or the United States are entitled to the teas or their proceeds.

The material facts disclosed at the trial in the circuit court, were as follows: Edward Thomson was a merchant, largely engaged in trade in the city of Philadelphia, in the year 1825; and on the 21st day of June of that year, borrowed, at *respondentia*, of the insurance company, the sum of $21,000, upon goods, &c. on board of the ship Addison of that port, on a voyage at and from Philadelphia, to Can-

ton, and at and from thence, back to Philadelphia; beginning the risk on the 21st of the preceding April; about which time the ship had sailed on the voyage. Edward Thomson had shipped on board of The Addison, for his own account and risk, for the voyage, 21,000 Spanish dollars, consigned to J. R. Thomson, his agent, and his assigns, and deliverable to him in Canton; and regular bills of lading were accordingly signed; one of which was retained by the shipper. At the time of the execution of the *respondentia* bond, a memorandum of agreement was entered into by the parties, and an assignment made on the back of this bill of lading. The form and effect of these instruments will be matter of more particular comment hereafter; at present, it is only necessary to add that the loan purports, on the face of the bond, to be a loan for the joint account of E. Thomson, E. H. Nicoll, F. H. Nicoll, and F. S. Bailey; but in reality the transaction was for the use and benefit of E. Thomson, and the goods shipped in The Addison were on his sole account.

On the 14th July of the same year, a loan was made to Edward Thomson, of $13,960, on goods on board the ship Superior, which had sailed on a similar voyage, on the 6th of *June [*435] preceding. A *respondentia* bond was taken in the same form, from the same parties, on the like voyage, with a similar memorandum of assignment of the bill of lading. The only difference between the transactions was, that this loan was applied in part payment of a former loan, made by the insurance company on another ship of E. Thomson's. On the 19th of November, E. Thomson, having become insolvent, made a general assignment of all his property to Peter Mackie and Richard Renshaw, for the use of his creditors. At this time, he was very largely indebted to the United States on duty bonds. The Addison left Canton on her return to Philadelphia, having among her papers a bill of lading of the proceeds of the $21,000, consigned by the shipper (Mr. Fisher, attorney for J. R. Thomson,) to order in blank, and indorsed in blank by the shipper, and marked No. 5. This mark was to identify them as the proceeds of the $21,000. Mr. Fisher also gave the master a manifest, stating the cargo to be consigned to E. Thomson, and a general bill of lading of the whole cargo, consigning it to E. Thomson. The invoice and bill of lading were dated 22d November, 1825. The general bill of lading was not signed. The Superior left Canton, having among her papers a bill of lading of certain articles, valued in the invoice at $3,393, consigned to Peter Mackie, and also a bill of lading of certain articles, valued at $1,139.86, consigned to Barclay Arny, and both dated 2d December, 1825. Before the arrival of these ships in America, the United States had obtained judgments against E.

Thomson, for large sums of money due upon his bonds at the custom house. Both ships arrived in Delaware Bay, almost at the same time; and an execution issued on behalf of the United States, on one of the judgments against E. Thomson, on the 13th March, 1826, and was levied on the ships and their cargoes on the 15th of March, while they were yet in the bay. It was under this levy, that the goods in controversy were seized by the marshal.

Two or three days before the ships came up to Philadelphia, Peter Mackie, the assignee of E. Thomson, having received duplicates of the invoice and bills of lading of the cargo of the Addison, delivered them to the agents of the insurance company at Philadelphia; and upon the arrival of the ship itself, handed over to the same agent the invoices and bills of lading brought by the master. On the 22d of March, 1826, Peter Mackie and Barclay Arny indorsed to the insurance company the invoices and bills of lading which came to their order by The Superior. These papers came under cover to Edward Thomson, several being inclosed in the same envelop; and Mackie allotted them to their respective owners, by means of the numbers indorsed upon them. These numbers were orig-
[*436] inally *placed upon the outward and homeward bills of lading and invoices, for the purpose of designating the proceeds of each particular shipment. It appeared that part of the $13,960 borrowed of the insurance company on the goods in The Superior, was expended in disbursements in Canton; and the two invoices to Mackie and Arny were consigned to them contrary to instructions; and they assigned them to the insurance company, under the belief that they were the proceeds of the outward shipment pledged for the loan. The reason assigned for there being a manifest and general bill of lading, consigning the cargo to Edward Thomson, was to enable him to enter the cargo in his own name, after he had settled with the insurance company, and paid the *respondentia* loans. The several particular invoices and bills of lading were then to be cancelled, and the master was to sign the general bill of lading, and the cargo was to be entered at the custom-house, in the name of E. Thomson. He was in the habit of taking up other large sums, at *respondentia*, and this was the usual course of his arrangements in business.

Such is the general outline of the case. The loan on the shipment in The Superior, as has been already stated, differs from that on the shipment in The Addison, only in the circumstance that it was applied in discharge of a prior loan. In our judgment, that makes no difference as to the legal rights of the parties. The borrower had a right to apply the loan in any manner he pleased, and the mode of

its application, if it be otherwise *bonâ fide* and legal, does not change the posture of the rights of the lender. We shall therefore dismiss, at once, all further consideration of this point, and treat both cases as if they stood on a single shipment.

Several objections have been taken to these *respondentia* bonds, to impeach their original validity. It is said that they ought to be treated as usurious or gaming contracts; that they are not to be deemed *bonâ fide* transactions upon real risks; but transactions void in point of law upon their face. So far as the questions of usury or gaming, or *bona fides* upon substantial risks, are matters of fact, they were left fully open, and have been passed upon by the jury, who have found a verdict against them; so far as there are matters of law apparent upon the record, proper to avoid the bonds, they are still open for inquiry. Two grounds have been relied on for this purpose; First, that the loans were made after the sailing of the ships on the voyage; and secondly, that the money loaned was not appropriated to the purchase of the goods put on board, and was not the identical property on which the risk was run. In our judgment, neither of these objections can be sustained. It is not necessary that
[*437]
a *respondentia* loan should be made before the departure of the ship on the voyage, nor that the money loaned should be employed in the outfit of the vessel or invested in the goods on which the risk is run. It matters not at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming, or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. The lender is not presumed to lend upon the faith of any particular appropriation of the money; and if it were otherwise, his security could not be avoided by any misapplication of the fund, where the risk was *bonâ fide* run upon other goods, and it was not a mere contract of wager and hazard. What could be the effect if it were a mere wagering contract, it is unnecessary to consider; because there is the clearest proof here that there was property on board belonging to the borrower, and sailing on the voyage at his risk.

The form of the *respondentia* bond in the present case is, as far as we know, the common and usual form. The only deviation from the actual facts is, that it seems in some of its provisions to contemplate the voyage as not then commenced. This probably arose from using the common printed form, which is adapted to that as the ordinary case. But it misled no one, and was certainly perfectly under-

stood by the parties. The risk was taken for the whole voyage, precisely as if the ships had been then in port; and if, before the bonds were given, the property had been actually lost by any of the perils enumerated in it, it is clear that the loss must have been borne by the lenders. They could not have recovered it back, since the event was one within the scope and contemplation of the contract. The safety, then, of the property at that particular period does not vary the rights of the parties; and, from the very nature of the transaction, it must have been utterly unknown to both whether the ship was at the time in safety or not. They entered into the contract upon the usual footing of policies of insurance, lost or not lost. So far as this deviation from the fact bore upon the point of the good faith and reality of the contract, as a genuine maritime loan, it was left to the jury to draw such inferences as upon the whole circumstances they were warranted to draw. The charge of the learned judge in the circuit court was as favorable to the defence on this point as it could be upon the principles of law.

The next question is, in whom was the property in the shipment vested at the time of the levy of the execution of the United
[* 438] States? Was it so vested in the insurance company, * either in law or equity, that they are now entitled to maintain the present suit, or, in other words, to recover the proceeds in the marshal's hands? This depends upon the view taken of the objects, intentions, and acts of the parties, as disclosed in the bonds and the accompanying papers. When these are once ascertained and settled, it will not be difficult to arrive at the proper legal conclusion.

It is contended on behalf of the United States that no title or interest in the property shipped passed, by the instruments taken collectively, to the insurance company; that Edward Thomson remained the sole owner of the goods and their proceeds during the whole voyage; that at most the insurance company had but a lien upon them for the security of their debt, which was displaced by the priority of the United States; and, finally, that if the insurance company had any title or interest in the property, it was not absolute, but by way of mortgage; and even this, coming in competition with the priority of the United States by operation of law, yields to their superior privilege.

Before proceeding to the discussion of the right of the insurance company over the property in question, it may be well to consider what is the nature and effect of the priority of the United States under the statute of March 2, 1799. Although that subject has been several times before this court, the observations which have fallen from the bar show that the opinions of the court have sometimes not

been understood according to their true import. The 65th section of the act declares that, "in all cases of insolvency, or where any estate in the hands of executors, administrators, and assignees shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, &c., shall be first satisfied; and any executor, administrator, or assignees, or other person, who shall pay any debt due by the person or estate from whom or for which they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; and actions or suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognizance thereof." A subsequent clause of the same section declares that "the cases of insolvency mentioned in this section shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors, or in which the *estate and effects of an absconding, [*439] concealed, or absent debtor shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed." It is obvious that this latter clause is merely an explanation of the term "insolvency," used in the first clause, and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors stands wholly upon the alternative in the former part of the enactment. Insolvency, then, in the sense of the statute, relates to such a general devestment of property as would in fact be equivalent to insolvency in its technical sense. It supposes that all the debtor's property has passed from him. This was the language of the decision in the case of the United States *v.* Hooe, 3 C. 73; and it was consequently held that an assignment of part of the debtor's property did not fall within the provision of the statute. So, too, a mere inability of the debtor to pay all his debts is not an insolvency within the statute, but it must be manifested in one of the three modes pointed out in the explanatory clause already referred to. That was the point on which the case of Prince *v.* Bartlett, 8 C. 431, turned.

What, then, is the nature of the priority thus limited and established in favor of the United States? Is it a right which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing by virtue of such assignment to

the assignees? Or, is it a mere right of prior payment out of the general funds of the debtor in the hands of the assignees? We are of opinion that it clearly falls within the latter description. The language employed is that which naturally would be employed to express such an intent, and it must be strained from its ordinary import to speak any other.

Assuming that the words "in all cases of insolvency" indicate an entire class of cases, and that the other member of the sentence, "or when any estate," &c., is to be read distributively, as has been contended for on behalf of the United States, it does not in the slightest degree vary the construction of the statute. It will then read, that "in all cases of insolvency, the debt or debts due to the United States, &c., shall be first satisfied."

But how are they to be satisfied? Plainly, as the succeeding clause demonstrates, by the assignees, who are rendered personally liable if they omit to discharge such debt or debts. To enable the assignees to pay the United States, it is indispensable that the fund should pass to them; and if the mere priority of the United States intercepted it, or gave a right to defeat it, the object of the [*440] statute would not be accomplished. *If the legislature had intended to defeat the passing of the property to the assignees, as against debts due to the United States, the natural language in which such an intention would be clothed would be to declare that, so far, such assignments should be void. Then again, the very enumeration of the cases of insolvency, in all of which the assignment passes and is to pass the whole of the debtor's property, confirms the interpretation already asserted. They are the very cases where by law there is no exception as to the extent or operation of the assignment to devest the debtor's estate. One of these is the case of a legal bankruptcy; and in the act on this subject, passed in the next session of Congress, there is an express provision, in the 62d section,[1] that "nothing contained in this law shall in any manner affect the right or preference to prior satisfaction of debts due to the United States," as secured or provided by any law heretofore passed. Yet the bankrupt act contains no exception as to the property to be passed to the assignees, in favor of any person. In the case of the United States *v.* Fisher *et al.* 2 C. 358, which was decided upon great deliberation, this court held, in the construction of a similar clause in the act of 3d March, 1797, c. 74,[2] that "no lien is created by this law, no *bonâ fide* transfer of property in the ordinary course of business, is overruled. It is only a priority in payment, which, under different modifications, is a regulation in common use; and

[1] 2 Stats. at Large, 36. [2] 1 Ib. 515.

this priority is limited to a particular state of things, when the debtor is living, though it takes effect generally if he be dead." And this doctrine was again recognized in the United States *v.* Hooe, 3 C. 73, 90.

If, then, the property of the debtor passes to the assignees, if debts due to the United States constitute no lien on such property, if the preference or privilege of the United States be no more than a priority of satisfaction or payment out of a common fund, it would seem to follow, as a necessary consequence, that, even if the teas in controversy were the property of Edward Thomson, they passed, by his general assignment, in November, 1825, (which is not denied to have been a *bonâ fide* and valid transaction,) to his assignees, and become their property for distribution among his creditors, and were not liable to the levy under the execution of the United States.

That, however, would be a question merely between the United States and the assignees, and would in no shape help the Atlantic Insurance Company to maintain their present suit.

Then, again, it is contended on behalf of the United States that the priority thus created by law, if it be not of itself a lien, is still superior to any lien, and even to an actual [*441] mortgage, on the personal property of the debtor.

It is admitted that where any absolute conveyance is made, the property passes so as to defeat the priority, but it is said that a lien has been decided to have no such effect; and that, in the eye of a court of equity, a mortgage is but a lien for a debt. Thelluson *v.* Smith, 2 W. 396, has been mainly relied on in support of this doctrine. That case has been greatly misunderstood at the bar, and will require a particular explanation. But the language of the learned Judge who delivered the opinion of the court in that case, is conclusive on the point of a mortgage: "The United States," said he, "are to be first satisfied; but then it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bonâ fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt; or if his property has been seized under a *fieri facias*, the property is devested out of the debtor, and cannot be made liable to the United States." The same doctrine may be deduced from the case of United States *v.* Fisher, 2 C. 358, where the court declared that "no *bonâ fide* transfer of property in the ordinary course of business, is overreached by the statutes;" and "that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee." If so plain a proposition required any authority to support it, it is clearly maintained in United States *v.* Hooe, 3 C. 73.

It is true that in discussions in courts of equity, a mortgage is

sometimes called a lien for a debt. And so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity; for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate, and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is therefore only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute, and indefeasible. But it has never yet been decided, by this court, that the priority of the United States will devest a specific lien, attached to a thing, whether it be accompanied by possession or not. Cases of lien accompanied by possession are, among others: the lien of a ship's owner to detain goods for freight, the lien of a factor on the goods of his principal for balances due him; the lien of an artisan for work and services upon the specific thing. [*442] On the other hand, there are liens *where the right is perfect, independent of possession; as the lien of a seaman for wages, and the lien of a bottomry holder on the ship for the sum loaned. In none of these cases has it ever been decided that, in a conflict of satisfaction out of the thing itself, the priority of the United States cut out the lien of the particular creditor. And before such decision is made, it will deserve very grave deliberation, and a marked attention to what fell from the court, in Nathan *v.* Giles, 5 Taunt. 558, 574. At present, it is wholly unnecessary to decide it, for reasons which will hereafter appear. The case of Thelluson *v.* Smith, 2 W. 396, is not understood to justify any such conclusion. That case turned upon its own particular circumstances. A judgment, *nisi*, was obtained against Crammond, on the 20th of May, 1805, in favor of Thelluson and others. On the 22d of the same month, he executed a general assignment of all his estate to trustees for the payment of his debts. At that time he was indebted to the United States, on several duty bonds, which became due at subsequent periods. Suits were instituted on these bonds, as they severally became due, and judgments were obtained and executions issued against Crammond, under which a landed estate called Sedgely, was levied upon and sold by the marshal; and the action was brought by Thelluson and others, against the marshal, to recover the proceeds of this sale in his hands. No execution had ever issued upon the judgment of Thelluson and others against Crammond, and of course there had been no levy under that judgment on the Sedgely estate, before or after the levy in favor of the United States. It was

admitted that, in Pennsylvania, a judgment constitutes a lien on the real estate of the judgment debtor; and it was assumed by this court, in the argument of the cause, that the judgment of Thelluson and others bound the estate from the 20th of May, when it was entered, *nisi*, although in fact it was not finally entered until nearly a year afterwards. The posture of the case, then, was that of a judgment creditor seeking to recover the proceeds of a sale of land sold under an adverse execution, out of the hands of the marshal, upon the ground of his having a mere general lien, by his judgment, on all the lands of his debtor; that judgment never having been consummated, by any levy on the land itself. The court decided that the action was not maintainable. The reasons for that opinion are not, owing to accidental circumstances, as fully given as they are usually given in this court. But the arguments of the counsel point out grounds upon which it may have proceeded, without touching the general question of lien. The plaintiffs were entitled to recover only upon the ground that they could establish in themselves a rightful title to the proceeds. Whether the land *itself was [*443] rightfully sold under the execution of the United States, or any title to it passed by the sale, as against the assignees of Cram mond, was not matter of inquiry in that case. However tortious or invalid it might be, still, if the plaintiffs had no title to the proceeds, they must fail in their action. Under the general assignment of the debtor, the priority of the United States attached; and if the assignees were willing to acquiesce in the sale, the right of the United States to hold the proceeds could not be disturbed by third persons. Now it is not understood that a general lien by judgment on land, constitutes, *per se*, a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of his judgment, so as to cut out intermediate incumbrances. But subject to this, the debtor has full power to sell, or otherwise dispose of the land. His title to it is not devested or transferred by the judgment to the judgment creditor. It may be levied upon by any other creditor, who is entitled to hold it against every other person except such judgment creditor; and even against him, unless he consummates his title by a levy on the land, under his judgment. In that event the prior levy is, as to him, void, and the creditor loses all right under it. The case stands, in this respect, precisely upon the same ground as any other defective levy or sale. The title to the land does not pass under it. In short, a judgment creditor has no *jus in re*, but a mere power to make his general lien

effectual, by following up the steps of the law, and consummating his judgment by an execution and levy on the land. If the debtor should sell the estate, he has no right to follow the proceeds of the sale into the hands of vendor or vendee, or to claim the purchase-money in the hands of the latter. It is not like the case where the goods of a person have been tortiously taken and sold, and he can trace the proceeds, and waiving the tort, chooses to claim the latter. The only remedy of the judgment creditor is against the thing itself, by making that a specific title which was before a general lien. He can only claim the proceeds of the sale of the land, when it has been sold on his own execution, and ought to be applied to its satisfaction. To this state of things, the language of the court in Thelluson *v.* Smith is to be applied, when it is said that if the debtor's property is seized under a *fi. fa.*, it is devested out of the debtor, and cannot be liable to the United States. Applying these principles to the facts of that case, it is clear that the Sedgely estate had not been devested out of the debtor by any execution on the judgment of [*444] Thelluson and others; that it either remained in *the debtor, and was liable to the execution of any other of his creditors who choose to levy upon it, subject, of course, to have his title overruled by their subsequent levy, when perfected; or that, subject in like manner, it passed by the assignment, (if that was *bonâ fide*,) to the assignees, and in their hands the United States would have a priority of payment out of it, as general funds in their hands. The judgment creditors as such had no title to any fund in the hands of the assignees, until the priority of the United States was satisfied; for that priority does not yield to any class of creditors, however high might be the dignity of their debts.

The fact that a judgment creditor has a lien, does not place him in a better situation as a creditor of the general funds of the debtor in the hands of the assignees. If he possess such a lien, he must enforce it in the manner prescribed by law; and if he does, that may so far affect the interest of the assignees actually subjected to such lien. But it gives him no rights to the fund, until he has perfected his lien according to the course of the law. Until that period, he has merely a power over the property, and not an actual interest in it. This ground is alluded to in that part of the opinion of the court where, speaking of the priority of the United States, it is said: "The law makes no exception in favor of prior judgment creditors, &c. Exceptions there must necessarily be as to the funds out of which the United States are to be satisfied; but there can be none in relation to the debts due from a debtor of the United States to individuals. The United States are to be first satisfied; but then it must

be out of the debtor's estate." The real ground of the decision was, that the judgment creditor had never perfected his title, by any execution and levy on the Sedgely estate; that he had acquired no title to the proceeds as his property, and that, if the proceeds were to be deemed general funds of the debtor, the priority of the United States to payment had attached against all other creditors; and that a mere potential lien on land did not carry a legal title to the proceeds of a sale made under an adverse execution. This is the manner in which this case has been understood by the judges who concurred in the decision; and it is obvious that it established no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States, since that priority is not of itself equivalent to a lien.

We may, then, dismiss any further consideration of this topic, unless it shall appear that the right of the *respondentia* holders, in the present case, is reduced to a mere general lien; and, as to them, at least, (however it may be as to the assignees,) no legal right exists to maintain an action for the proceeds. * The [*445] attention of the court will then be at once addressed to the question, what was the nature and extent of the interest of the insurance company in the shipments in question? It is unnecessary to discuss what would have been the rights of the parties if the *respondentia* bonds had stood alone; for, that is not the posture of this case. The whole instruments must be taken together and construed as one entire agreement. We must, then, examine the memorandum, the outward bill of lading and assignments thereon, in connection with the bond. The bill of lading purports, on its face, to be a shipment, by Edward Thomson, of seven kegs, containing $21,000, for account and risk of the shipper; to be delivered, at Canton, to John R. Thomson or his assigns. By the well-settled principles of commercial law, the consignee is thus constituted the authorized agent of the owner, whoever he may be, to receive the goods, and by his indorsements of the bill of lading to a *bonâ fide* purchaser, for a valuable consideration, without notice of any adverse interests, the latter becomes, as against all the world, the owner of the goods. This is the result of the principle that bills of lading are transferable by indorsement, and thus may pass the property. It matters not whether the consignee, in such case, be the buyer of the goods, or the factor, or agent of the owner. His transfer in such a case is equally capable of devesting the property of the owner, and vesting it in the indorsee of the bill of lading. And, strictly speaking, no person but such consignee can, by an indorsement of the bill of lading, pass the legal title to the goods. But if the shipper be the owner, and the ship-

ment be on his own account and risk, although he may not pass the title by virtue of a mere indorsement of the bill of lading, unless he be the consignee, or what is the same thing, it be deliverable to his order, yet, by any assignment, either on the bill of lading or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except such a purchaser for a valuable consideration, by an indorsement of the bill of lading itself. Such an assignment not only passes the legal title as against his agents and factors, but also against his creditors, in favor of the assignee. It is unnecessary to cite particular authorities on these points; they will be found supported by the authorities cited at the argument, and by the elementary treatises of Mr. Abbott, Mr. Holt, and Mr. Chitty, on this subject; and particularly by Nathan *v.* Giles, 5 Taunt. 558. In the present case, Edward Thomson was the owner of the goods, and the consignee was merely his factor. He, therefore, had full power, notwithstanding the consignment, to pass the title to the property in the bill of lading, by a suitable instrument of assignment and sale against anybody, but a purchaser [*446] *without notice from his consignee, without any actual delivery of the goods themselves, if they were then at sea, and incapable of manual tradition.

The question then is, whether the indorsement upon this bill of lading constitutes such an instrument? We are of opinion that it does. It purports to be a transfer *in præsenti;* and uses the appropriate phrases of grant. The words are: "For value received, I hereby assign and transfer to the Atlantic Insurance Company of New York, the within bill of lading, and the specie, goods, &c., to be procured thereon and thereby, and any return cargo to be obtained, &c., by the proceeds thereof; and all the return cargo to be taken on board the within-named ship, by or on my account, as collateral security, according to an agreement duly executed, and adjoined to a *respondentia* bond, &c., (referring to the memorandum hereinafter stated.) This is not a mere assignment of the bill of lading itself, operating as an equitable grant of the interest of the owner in that instrument, but it is of the goods contained in it; and the bill of lading is referred to, by way of description of the subject-matter of the grant. There was a valuable consideration for it; and, as Edward Thomson was the legal owner of the goods, the words "assign and transfer," are sufficient words of grant to pass his legal title to the same, unless the operation of those words is controlled by some of the other parts of the instrument. The argument admits this; but it supposes that the accompanying memorandum shows that such was not the intention of the parties; and therefore the words are to

be construed according to that intention, which was to create a mere lien or equity on the part of the insurance company, on the goods. Let us then examine the nature and scope of that memorandum. It begins by a recital that it hath been agreed that the bill of lading for the goods, &c., mentioned in the *respondentia* bond, shall be indorsed to the insurance company, as a collateral security for the loan. This is carried into effect by the assignment above mentioned. It then goes on to recite that it has been further agreed that the property to be shipped homeward, as aforesaid, being the proceeds of the loan, (thus considering the specie on board as a substituted loan,) shall be for the account and risk of the borrowers; that the bills of lading, therefore, shall express the same, and shall also express that the said property shall be delivered to the order of the shippers; and that the same shall be indorsed in blank, and shall be placed in the hands of the insurance company, either before or on the arrival of the said ship, at Philadelphia, as a continuation of such collateral security.

Now, supposing the transaction *bonâ fide*, what is there here that controls, even by way of recital, the operation of the words * of transfer. If the case were one of absolute trans- [* 447] fer there might be some room for doubt. But here the transfer was as collateral security. It was therefore a mortgage of the goods and the returns. The shipment out and home was, as in each case it must be, at the risk and for the account of the shipper; subject, however, to the rights of the mortgagee; and the very provision that the bills of lading should be delivered to the order of the shipper, and indorsed in blank and placed in the hands of the insurance company, establishes the fact that it was the intention of the parties that the property of the return cargo should rest by such indorsement in them. The memorandum then proceeds to state that it is expressly declared that the indorsement or consignment shall not be held to exonerate the persons of the borrowers, nor compel the insurance company to accept the goods, &c., which may arrive under such bill of lading and consignment, in discharge of such debt; but that it shall be lawful for the company to receive and hold the goods, &c., for ninety days after their arrival at Philadelphia; and, if the debt was not then paid, to sell the same at auction, and charge the borrowers with the balance. The plain effect of this stipulation is, to avow an explicit understanding that the assignment of the goods should not put them at the risk of the company, but that they should be deemed collateral security only, and be sold after the limited time to discharge the debt, *pro tanto*. So far from the intention being indicated that no property at all was to pass to the company, the solicitude of the parties seems most carefully employed

to repel the notion that the transfer was absolute and not by way of mortgage, as collateral security. The memorandum, therefore, confirms and does not impugn, in any degree, the natural construction of the language of the assignment indorsed on the bill of lading, as importing a present transfer. Indeed, we may go further, and assert that the obvious intention of the parties was to give a specific interest in the goods shipped, so as to make them secure against the claims of creditors; and that to construe the instruments to create no more than a lien, liable to be defeated by the acts of either party, or to be overreached by any privileged creditors, would be not to follow but to frustrate their intention. Of what use could this great apparatus of instruments so anxiously prepared by the parties be, if it conveyed no *jus in re*, and left the title of the insurance company to the goods at the mercy of the creditors of Thomson, to be intercepted at any time before it reached their hands on its arrival. We are therefore of opinion that the assignment in this case was sufficient to pass a legal title to the shipment and the proceeds thereof, against Thomson and his assignees and creditors. If, in-
[*448] deed, the assignment had been of the outward shipment * of goods only, it would have carried the return cargo purchased with the proceeds; because the product or substitute for the original thing, by sale or otherwise, follows the nature of the thing itself, so long as it can be ascertained as such, and becomes the property of him who was the owner in the same quality as he held the thing. This is the general principle of law, and has been even extended to cases where there has been a fraudulent or tortious misapplication of property. The case of Taylor *v.* Plumer, 3 Maul. & Selw. 562, is directly in point, and contains a large collection of the authorities in the elaborate opinion of the court pronounced by Lord Ellenborough. In this view of the matter, the only value of the homeward bill of lading would be as a designation of the proceeds, so as to enable the company to trace and identify them. But the assignment in terms transfers the proceeds and returns, and cuts off all possibility of question upon this head. If, indeed, the title to the proceeds had originally been only an equitable title and not strictly legal, yet as soon as the company had perfected that equity, by indorsement in blank, and possession of the homeward bills of lading, their right would have been consummated at law so as to entitle them to maintain a suit therefor. The case of Haille *v.* Smith, 1 Bos. & Pull. 563, was not so strong as the present; and there, the court held that the property passed, clothed with a trust for the payment of the debt. If this, then, be the result of the general principles of law in cases of this nature, what is there to prevent their application to the

present case? First, it is said that this debt upon a *respondentia* bond is of too contingent a nature to uphold a mortgage as collateral security for the payment of it. We know of no principle or decision that justifies such a conclusion. Mortgages may as well be given to secure future advances and contingent debts, as those which already exist, and are certain and due. The only question that properly arises in such cases is, the *bona fides* of the transaction. Then, again, it is said that the papers here disclose a transaction fraudulent in its own nature. But we are of opinion that there is no necessary implication of law on the face of these papers which stamps it fraudulent; for aught that appears, the agreement may have been entered into with the most sincere and scrupulous good faith; and whether fraudulent or not, in fact, was a question for the jury upon the whole evidence, which was properly left to their consideration, and they have by their verdict negatived the fraud.

The circumstance that the goods were to be at the risk of the shipper and on their account, does not of itself affect either the validity or *bona fides* of the transfer. That must ordinarily occur where the transfer is made as collateral security, and it
*was one of the leading facts of Haille *v.* Smith, already [*449] cited. 1 Bos. & Pull. 563.

But the main objection relied on, and which indeed constitutes one of the exceptions to the opinion of the circuit court is, that possession of the return shipment was not obtained until after the levy by the United States; and it is contended that the want of such possession is, *per se*, a badge of fraud. The circuit court on this point decided "that the actual possession of the above return cargoes, by the masters of The Superior and Addison, until levied upon by execution at the suit of the United States against Thomson, is not, *per se*, in law, a badge of fraud, which ought to invalidate or affect the title of the plaintiffs to these cargoes.

It appears to us that this decision is entirely correct in point of law, under the circumstances of the case.

Without undertaking to suggest whether, in any case, the want of possession of the thing sold constitutes, *per se*, a badge of fraud, or is only, *primâ facie*, a presumption of fraud, a question upon which much diversity of judgment has been expressed, it is sufficient to say that, in case even of an absolute sale of personal property, the want of such possession is not presumptive of fraud, if possession cannot from the circumstances of the property be within the power of the parties.

A familiar example of this doctrine is in the case of a sale of a ship, or goods at sea, where possession is dispensed with upon the

plain ground of its impossibility; and it is sufficient if the vendee takes possession of the property within a reasonable time after its return home. But in cases where the sale is not absolute, but conditional, the want of possession, if consistent with the stipulations of the parties, and, *à fortiori*, if flowing directly from them, has never been held, *per se*, a badge of fraud. The books are full of cases on this subject. The case of Bucknal *v.* Roiston, Prec. in Chan. 285, runs almost upon all fours with the present. The cases of Sturtevent *v.* Ballard, 9 Johns. 338, and Bissell *v.* Hopkins, 3 Cowen, 166, contain strong illustrations of the principle; and, being decisions in the very State by whose laws the validity of the present agreement is to be tried, are of high authority. They sustain the doctrine asserted by the circuit court, in the most ample manner; and there is a learned note by the reporter to the latter case which embodies in an exact manner the principal authorities, English as well as American, on this subject. Now in the case at bar, the goods at the time of the transfer were at sea on a voyage in which they were to be sold or exchanged by the consignee, and the proceeds sent back in the same ships. It was therefore properly in the contemplation of the parties, and indeed a necessary result of their stipulations, [* 450] that the * goods should not be intercepted or taken possession of by the company until the close of the voyage; and that the return shipments should conform to this arrangement.

There is no pretence to say that the plaintiffs did not seek possession of the goods within a reasonable time after the arrival of the goods home. Their power to accomplish it was dislodged by the execution of the United States, and they obtained, as early as practicable, possession of the bills of lading, and vouchers of their rights. But so far as the want of possession was matter of evidence presumptive of fraud, it was left open to the consideration of the jury; and the grievance now is, not that it was so left, but that the court ought to have instructed the jury, as matter of law, that the want of possession, under the circumstances of the case, was, *per se*, a badge of fraud.

We have already expressed an opinion that the court were right in the instructions actually given.

Upon the whole, we are of opinion that the directions of the court upon the merits of the cause at the trial, were correct in point of law; and that, consequently, there is no error in that part of the judgment.

It remains to consider, very briefly, certain exceptions taken to the testimony in the progress of the trial.

The first exception is, that the corporate capacity of the plaintiffs

was not regularly proved before the introduction of the *respondentia* bond. It is to be considered that this was a trial upon the merits; and by pleading to the merits, the defendants necessarily admitted the capacity of the plaintiffs to sue. If he intended to take the exception, it should have been done by a plea in abatement, and his omission so to do was a waiver of this objection. But, independently of this special ground, the very agreement in the case upon which the trial was had as well as the admissions of the bond given to the United States as security to refund the amount, if judgment should pass against the plaintiffs, was certainly *primâ facie* evidence of an admission, on the part of the United States, of the corporate capacity of the plaintiffs, and to throw the burden of proof on the other side.

The second exception was to the question put to Austin L. Sands, whether he was agent of the company.

We see no objection to this question. It was put in a form most unexceptionable; and it was a matter of subsequent inquiry in what manner his agency was created; and it does not appear, from the nature of the question, whether it might not have been sufficient to establish that he was an agent, *de facto*, to receive the bond. It was, indeed, but an exception to the order of proofs where several things are to be established to lead to a result; and in what order the inquiry is to be had, is * matter of discretion in the court [* 451] itself, and not of absolute right in the party.

The next exception is to the allowance of the bond to go to the jury, upon proof of its execution, by Thomson only.

It was a joint and several bond, and if executed by Thomson alone, it might be material to the plaintiffs' case. It was not introduced as general evidence as to all the parties who were named in it; but only as to Thomson, and was connected with the title derived under him. Proof of the signature of Thomson was, under the circumstances, *primâ facie* evidence of his execution of the instrument.

The 4th, 5th, 6th, and 7th exceptions turned altogether upon the question, whether acts and proceedings of third persons, not in privity with the insurance company, nor known to them, were evidence against them? Most clearly they were not.

The 8th exception involves the point, whether the plaintiffs were bound to look to the application of the loan made by them. If not, the question asked was properly rejected. And we are of opinion that the plaintiffs had nothing to do with the application of the money; and that, when received by Thomson, he had a right to dispose of it in any manner he pleased.

Upon the whole, the judgment of the circuit court is to be affirmed with costs.

JOHNSON, J. I concur in the opinion delivered in this cause, and the rather, because I think it overturns the report of the decision in the case of Thelluson *v.* Smith. It would be vain to endeavor to reconcile this decision with that which is imputed to the case referred to.

This was nothing in its origin but a mortgage to the Atlantic Insurance Company; and a mortgage of a mere right, a metaphysical, transitory thing, over which the act of the party could not operate more immediately or more forcibly than a judgment upon land, under the laws of Pennsylvania.

But I avail myself of this occasion, and I have long wished for an opportunity to put on record some remarks upon the report of the case of Thelluson *v.* Smith. I have never acknowledged its authority, in my circuit, on the point supposed to be decided by it, to wit, the precedence of the debt of the United States as to a previous judgment in the case of a general assignment; and I propose now to show, what I think any one may see by a close inspection of the facts, even as stated in the report, to wit, that the question there supposed to be decided really never was raised by the special verdict. It is true it was argued, and no other question, judging from the [*452] report, *was argued. But when the court came to inspect the record, it must have seen that the special verdict did not raise the question as between the parties to that suit. And, moreover, I find that the reporter has omitted one very material fact found in the special verdict; which was, that the United States had no interest in the issue, since their judgment had been voluntarily paid off by the assignees of Crammond, the bankrupt. I copy the special verdict entered from the original roll, which I have inspected at the present term.

The jury found "that on the 22d of May, 1805, William Crammond, of Philadelphia, merchant, stood indebted to the United States in several bonds for duties, as follows: (describing the bonds, all of which were due after the date of the assignment.) On the respective bonds suits were brought, judgments entered, executions issued, and a sale made of a certain real estate called Sedgely, the property of William Crammond, and the proceeds thence arising came to the hands of the defendant, John Smith, marshal of Pennsylvania district, from whom it is claimed by the plaintiffs (who are) creditors of the said William Crammond, on the following grounds: A suit was instituted by the plaintiffs, in the circuit court of the United States for the district of Pennsylvania, against the said William Crammond, as of October sessions, 1802, and a judgment in the said suit, in favor of the plaintiffs and against the said Crammond, was

obtained, for $32,253, on the 20th of May, 1805. On the 22d of May, 1805, the said William Crammond was insolvent, and had not sufficient property to pay all his debts. But his insolvency was not a matter of general notoriety. On the 22d day of the said month, the said William Crammond executed a general assignment of his estate and effects, bearing date the same day and year, and delivered it to the assignees therein named (*prout* assignment); being on the said 22d of May unable to satisfy all his debts. The moneys in the hands of the defendants are claimed by the assignees under the said assignment, who have satisfied the United States the amount of the debts due the United States. If upon the whole matter," &c., in the usual alternative form of a special verdict.

Judgment below was rendered for defendant, and it is impossible it could have been otherwise; but not, as I conceive, upon the ground stated, since it is one which the verdict does not raise. It is true, the question was argued, but adjudications are not to have their effect from the questions argued, and the views taken by counsel in their points or briefs. There is a sensible rule laid down on this subject, in a book of grave authority, and the truth of which this court has had occasion to verify not unfrequently; the purport of which is that counsel ought not to "move any thing in arrest of judgment, *except the roll wherein the judgment [*453] is entered, or the *postea* be in court; 22 Cas. B. B.; and the reason assigned is, that the court may be satisfied that the matter moved in arrest of judgment is truly recited from the record; for the court will not rely upon the allegation of counsel at the bar."

It often happens, after the most protracted discussions, that the court differ from counsel in their views of the questions actually raised on the record, and on grounds which have not been argued.

In the case of Thelluson *v.* Smith, I hold it to be incontrovertible that the question of priority could not have been adjudicated upon, on the verdict, as set out in the record.

The special verdict does not give the date of the levy and sale by the marshal, under the judgment by the United States; but as all Crammond's bonds to the United States fell due after the date of the assignment, it follows that the judgment, and necessarily all proceedings under it, were subsequent to the execution of that deed. The land levied on, therefore, had passed out of Crammond before the judgment of the United States was obtained, and of consequence the levy and sale under their execution was a mere nullity. Could this furnish the ground of an action for money had and received by the Thellusons, in right of a judgment prior to the consignment, against Smith the marshal? It obviously could not.

For, as against the Thellusons' rights, whatever they were, nothing had passed. The purchaser of the lands at marshal's sale, who had received nothing for the money, might have brought such an action against the marshal; and the assignees might have sued for and recovered the land; in which case it would have been held by them, as before, subject to Thelluson's judgment. But as between Thelluson and the marshal there was no privity of action. And this was the true ground for rendering the judgment of this court in the suit against the marshal.

It is true the special verdict introduces the assignees into the cause as claiming the money raised by the marshal, on the supposition that, after satisfying the United States, they succeeded to the priority of the United States. But suppose this recovery had been had against Smith, what was there to prevent the assignees from going on at law to recover the land of the vendee? They were no parties to the record, and there is nothing in the pleadings or the verdict to show that they had intervened, or had a right to intervene in the name of the United States. They could not maintain a right to succeed to the United States, under the provisions of the 65th section of the act of 1799, vol. 3, p. 197; because that right is extended only to sureties upon the bond. If they had acquired any right, as against the Thellusons, it was a mere general equity, which [*454] *could only have been asserted in a court of equity. At law, in this indirect mode, it could not have been asserted, if it could have availed them at all.

I, at least, would have it understood that I concurred in the judgment in the case of Thelluson *v.* Smith, on no other ground than the want of privity between the parties. Nor can I acknowledge it as authority to any other point; since the United States were satisfied, and the assignees could not be regarded in any view, at law, as succeeding to the priority of the United States, if the United States had priority; and since that priority could not come in question in a case in which the sale of the land was a mere nullity, as is distinctly affirmed in the present decision, because the assignment divested all the interest of the insolvent, so as to place it beyond the action of the *fieri facias*, issuing on the judgment of the United States.

Judgment affirmed, with costs.

1 P. 147, 291, 480; 6 P. 262; 8 P. 271; 10 P. 596; 12 P. 102; 1 H. 311; 7 H. 760; 8 H. 384; 14 H. 505.

The President, Directors, and Company of the Bank of Columbia v. Peter Hagner.

1 P. 455.

The contracts of vendor and vendee are construed to be dependent, unless a contrary intention plainly appears.

To sustain an action at law against the vendee for not accepting the property, the vendor must aver and prove his readiness and offer to perform, on the day fixed by the contract for performance.

Though the vendee took possession, if the vendor does not offer to perform on the day, the vendee may relinquish the possession, and treat the contract as rescinded.

The case is stated in the opinion of the court.

Key, for the plaintiffs.

Jones, contrà.

* Thompson, J., delivered the opinion of the court. [* 461]

This case comes up from the circuit court of the District of Columbia, upon a writ of error. It was an action against the defendant, Hagner, on a special agreement to purchase of the plaintiffs two lots of ground in the city of * Washington. [* 462] The court below, on the prayer of the defendant, instructed the jury that, upon the evidence given on the part of the plaintiffs, though found by them to be true, would not entitle the plaintiffs to recover in this action the purchase-money for the lots mentioned in the declaration. Under which instruction a verdict was found, and judgment rendered for the defendant; to reverse which the present writ of error has been brought.

The special agreement as stated in the declaration is, substantially, that on the 25th of April, 1818, it was agreed between the plaintiffs and defendant, that the plaintiffs should sell to defendant lots No. 1 and 2, in square 141, in the city of Washington, the property of the plaintiffs, at and for the price of twenty-five cents for each and every square foot contained in said lots; and that defendant agreed to purchase the lots at that price, and to pay for the same when thereunto required by the plaintiffs; setting out the quantity of land and amount of the purchase-money with an averment, that the plaintiffs had full power and authority to make the sale, and that they then were and ever since have been fully competent and able to make and deliver a good and sufficient deed conveying to the defendant a good title in fee, to said lots. And that afterwards, on or about the 8th day of May, 1821, the defendant declared and gave notice to the plaintiffs that he considered the agreement and sale

void, and would not comply with the same, and discharged the plaintiffs from making or causing to be made any deed of conveyance; and the plaintiffs further aver, that afterwards, on the 28th of September, in the year 1821, they being willing and able to make a conveyance of a good title to said lots, offered so to do, and requested the defendant to pay the purchase-money, according to the terms of the agreement, which he refused to do. The first inquiry that naturally arises is, whether any contract was, in point of fact, concluded between the parties. It has been objected that it does not appear that General Mason, through whom, in behalf of the bank, the negotiation was carried on, had any authority for that purpose. There is certainly great plausibility in this objection. There is no evidence expressly showing such authority. But this perhaps ought to be considered as having been waived by the defendant; as that part of the correspondence, from which the contract is supposed to be collected, was carried on with him in his official character of president of the bank. And the defendant, at no time, puts his objection to carrying the contract, if any was made, into execution, upon the want of authority in Mason to make it.

The contract is alleged in the declaration to have been made on the 25th of April, 1818, and the letter of Mason, of that [*463] *date, and signed by him as president of the bank, has been considered as closing the contract. This letter is as follows: —

"I have this day sold to Peter Hagner, of Washington City, lots No. 1 and 2, in square 141, in Washington City, and belonging to the Bank of Columbia, at twenty-five cents per square foot; payable at such periods as the bank may approve."

The time of payment being left to the option of the bank, it is said that in judgment of law the purchase-money was payable on demand; and this is no doubt true, if the bank had then closed the negotiation, and apprised the defendant that such was their determination as to the payment of the purchase-money. But this was not done; and the terms of the letter look to and necessarily imply some further negotiation. The payment was to be at such periods as the bank may approve. It was, therefore, clearly understood to be payable by instalments; and the periods to be approved by the bank, which would seem to leave the subject open to propositions to be made on the part of Hagner and submitted to the bank to be approved. And that such was the understanding of the parties is evident from the letter written by the defendant two days after, April 27, 1818, to the president of the bank as follows: —

"It would be desirable to me to have the payments to make for

the lots No. 1 and 2, in square 141, purchased of you by me, on Saturday, at twenty-five cents per square foot, in proportions and at periods to be met by my income. I accordingly propose that the whole amount of the purchase-money be divided into six quarterly payments, the first to be on the first of October next. If this be approved by the bank, I will give my notes, and I presume the bank will have no objections to give me a deed. If, however, it be preferred, I will bind myself to pay the money at the times stated above, and receive a bond of conveyance, conditional to give a full title when the money is paid. Do me the favor to send me in return a memorandum of our agreement on Saturday." Upon this letter was written in pencil, by General Mason, "accept. interest on each note as it becomes due."

Whatever, therefore, might have been the right of the bank to have closed the contract in the terms of the letter of the 25th of April, it was certainly waived by an acceptance of the modification contained in the letter of the 27th of April. Nor would any contract seem to be closed by this letter. It contained two distinct propositions by the defendant; the one to give his notes for the purchase-money, payable in six quarterly payments, the first to be made on the 1st of October then next, and *take a deed [*464] from the bank; the other to bind himself to pay the money at the times stated, and take a bond for a deed to be given when the whole purchase-money was paid. This necessarily required some further answer from the plaintiffs, not only to signify their election between the propositions, but to do some further act in confirmation of such election; either to give the deed or a bond for the deed. The note in pencil, made by the president of the bank upon the letter, could not fairly be understood as implying any thing more than an acceptance of the proposition to pay by instalments, and settling the terms of the contract to be concluded between the parties, upon the bank's electing which proposition to accept as to the mode of concluding the contract. But the contract could not be said to be consummated until such election was made and the writings executed.

Here the matter rested for nearly three years, without any thing being done on the part of the bank to close the contract, or to intimate that they considered any contract in force in relation to the purchase; and that not until after the defendant had given them formal notice that he considered the agreement void and at an end.

And he certainly had very good reason to think the bank so considered it; or that no agreement had in fact ever been concluded. For the defendant, by his letter of the 7th of October, 1818, gave the plaintiffs notice that he was prepared to pay the first instalment, which

according to his proposition fell due on the first of that month; and requesting of them a bond for a deed, to which no answer appears to be given, nor any one of the instruments paid or demanded; although the whole purchase-money became payable by the 1st of January, 1820, according to the proposed terms of the contract.

Upon this view of the case, it is at least very doubtful whether any contract was concluded between the parties; and if the cause turned upon this point alone, the judgment of the court below would be affirmed by a division of opinion in this court. But as there are other questions in the cause the determination of which leads to the same result, and upon which no difference of opinion exists, it has been thought proper to notice them.

Admitting, then, that a contract was entered into between the parties, the inquiry arises whether the plaintiffs have shown such a performance on their part as will entitle them in a court of law to sustain an action for the recovery of the purchase-money.

In contracts of this description, the undertakings of the respective parties are always considered dependent, unless a contrary [*465] *intention clearly appears. A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the consideration money enforced upon him, and yet be disabled from procuring the property for which he paid it.

Although many nice distinctions are to be found in the books upon the question whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent; yet it is evident the inclination of courts has strongly favored the latter construction, as being obviously the most just. The seller ought not to be compelled to part with his property without receiving the consideration; nor the purchaser to part with his money without an equivalent in return. Hence, in such cases, if either a vendor or a vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal. And an averment to that effect is always made in the declaration, upon contracts containing dependent undertakings, and that averment must be supported by proof. And that the one now before the court must be considered a contract of this description cannot admit of a doubt.

The plaintiffs, however, aver that they were willing and able to make a conveyance of a good title, and offered so to do on the 28th day of September, 1821; but this was only the day before the suit was commenced, and nearly two years after the time fixed for per-

formance; and they set up as an excuse for the delay in making the tender of a deed, the notice received from the defendant on the 8th of May, 1821, that he considered the agreement void and refused to carry it into effect.

The time fixed for performance, is, at law, deemed of the essence of the contract. And if the seller is not ready and able to perform his part of the agreement on that day, the purchaser may elect to consider the contract at an end. In Sugden's Law of Vendors, 275, it is said: "The general opinion has always been that the day fixed was imperative on the parties at law. This was so laid down by Lord Kenyon, and has never been doubted in practice. The contrary rule would lead to endless difficulties if in every case it must be referred to a jury to consider whether the act was done within a reasonable time; and the precise contract of the parties would be avoided in order to introduce an uncertain rule which would lead to endless litigation. But equity, which from its peculiar jurisdiction is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will in certain cases carry the *agreement into exe- [*466] cution, although the time appointed has elapsed." But he justly adds, perhaps there is cause to regret that ever equity assumed this power of dispensing with the literal performance of contracts in cases like those.

It was urged at the bar, that the rule on this subject was the same at law and in equity, and the case of Thomson *v.* Miles, 1 Esp. Ca. 184, was referred to in support of this proposition. And it is true that some of the remarks which fell from Lord Kenyon, on the trial of that cause, would seem to countenance such an opinion. For he permitted the seller to prove he had a good title, although the power of making that title was attained after the action was brought.

This was certainly going great lengths for a court of law. But it ought to be observed that in that case no time appears to have been fixed for completing the contract; and an application for the title had not been made by the purchaser, previous to the action brought by the vendor for breach of the contract, which it seems was considered necessary in that case. But, that Lord Kenyon did not mean to be understood as holding that the evidence would have been admissible to sustain the action, if there had been a time fixed for the performance of the contract, is very evident from his doctrine in numerous other cases before him. Thus in the case of Berry *v.* Young, 2 Esp. Ca. 641, he says a seller of an estate ought to be prepared to produce his title-deeds at the particular day. That a

court of equity will, under particular circumstances, enlarge the time. And in the case of Cornish *v.* Rowley, 1 Wheaton's Selwyn, 137, the action was for money had and received, to recover back money paid as a deposit on an agreement for the purchase of an estate, the defendant having failed to make out a good title, on the day when the purchase was to be completed; the counsel for the defendant said they were ready to make out a good title, to which Lord Kenyon replied: "As to the sentiments I have long entertained relative to the purchase of real estate, I find no reason for receding from them; they have been confirmed by conversing with those whose authority is much greater than mine. The vendor must be prepared to make out a good title on the day when the title is to become completed." On which the counsel for the defendant asked: "Do I understand your lordship to say that though the defendant can now make out a good title, yet, as that title did not form a part of the abstract, the plaintiff may avail himself of that circumstance?" To which Lord Kenyon answered: "He certainly may, and avoid the contract." And he directed the jury to find a verdict for the plaintiff for the deposit money.

In the case of Davis *v.* Hone, 2 Sch. & Lef. 347, Lord Redesdale said a court of equity frequently decrees specific perform-
[* 467] ance, * when the action at law has been lost by the default of the very party seeking the specific performance. To sustain an action at law, performance must be averred, according to the very terms of the contract. And again, in the case of Lennon *v.* Napper, 2 Sch. & Lef. 684, he reiterates the same doctrine, that courts of equity in all cases of contracts for lands, have been in the habit of relieving, where the party from his own neglect, had suffered a lapse of time, and from that and other circumstances, could not sustain an action to recover damages at law; for, at law, the party plaintiff must have strictly performed his part of the contract. And in the case of Wilde *v.* Fort and others, 4 Taunt. 334, the rule is recognized that if the vendor of an estate at auction does not show a clear title by the day specified, the purchaser may recover back his deposit, and rescind the contract, without waiting to see whether the vendor may ultimately be able to establish a good title or not. A purchaser is not bound to accept a doubtful title.

From these authorities it may be laid down as a settled rule that at law, to entitle the vendor to recover the purchase-money, he must aver in his declaration a performance of the contract on his part, or an offer to perform at the day specified for the performance. And this averment must be sustained by proofs, unless the tender has been waived by the purchaser.

The time fixed for the performance of the contract in this case must be understood to have been the 1st of January, 1820. The payment of the consideration money was to have been completed on that day, and no part of it having been paid, the defendant had a right to abandon his contract, unless the plaintiffs were then ready and offered to perform on their part, of which there was no evidence whatever offered upon the trial. They have attempted, however, to show that a tender of a deed was rendered unnecessary, by reason of the letter of the defendant of the 8th of May, 1821, in which he gave notice of rescinding the contract. But this letter can have no such effect. It was written sixteen months after the time fixed for the delivery of the deed, and when the defendant had a right to rescind the contract. If before the period had arrived when the deed was to be delivered, the defendant had declared he would not receive it, and that he intended to abandon the contract, it might have dispensed with the necessity of a tender, as the conduct of the defendant might in such case have prevented the act from being done; and he who prevents a thing from being done, shall never be permitted to avail himself of the non-performance which he himself had occasioned. But that rule can never apply, except in cases where the act which *is construed into a waiver, [*468] occurs previous to the time fixed for performance.

The possession taken of the lots by the defendant could, at most, only be considered a circumstance from which to infer that he considered the contract closed, but could not deprive him of the right of relinquishing it, and restoring the possession, if the plaintiffs were unable to make a title to him, or neglected to do it. The possession was taken, doubtless, under a belief that the contract would be performed by the plaintiffs, and a full title conveyed to him; but if the contract was unexecuted, the defendant had a right to disaffirm it, and restore the possession; and would have sustained an action to recover back the purchase-money, had it been paid. Sug. on Vend. 173, 183, and cases there cited.

The plaintiffs have therefore clearly failed to show such a performance on their part, as to entitle them, in a court of law, to call upon the defendant for payment of the purchase-money.

But admitting that no objection in point of time lay to the tender of the deeds, the day before the commencement of the present action; no title was thereby conveyed to the defendant, or at all events not such a one as he would at any time have been bound to accept. It was a title derived from John Templeman, under the deed of the 31st of March, 1809. Whereas Templeman had previously conveyed the same lots to the plaintiffs, by his deed of 7th

of March, 1807, in trust, with authority to sell the same for the payment of a debt due to the bank, and to pay over to him the surplus, if any there should be. The legal title to these lots is therefore still in the bank, and may be subject to the trust declared in the deed, from any thing that appeared upon the trial. And to allow the bank to recover the purchase-money, and turn the defendant over to a court of chancery to obtain a title, would be going further than any known principles in courts of law will warrant; no act whatever having been done by the plaintiffs, to transfer to the defendant the title vested in them under the deed of 1807.

To substantiate the present action under such circumstances, would be compelling the defendant to take a lawsuit, instead of the land for which he contracted. *Judgment affirmed, with costs.*

DOE on the demise of JOHN A. ELMORE, Plaintiff in Error, *v.* WILLIAM A. GRYMES AND JOHN J. BEATIE, Defendants in Error.

1 P. 469.

A circuit court of the United States has not power to order a peremptory nonsuit against the will of the plaintiff. He has a right to have his case submitted to a jury.

ERROR to the circuit court of the United States for the district of Georgia, in an action of ejectment.

After the plaintiff's evidence was closed, the defendants moved for a nonsuit, which was ordered by the court against the will of the plaintiff.

Wilde and *M'Duffie*, for the plaintiff.

Berrien, contrà.

[* 471] * MARSHALL, C. J., delivered the opinion of the court.

The court has had this case under its consideration, and is of opinion that the circuit court had no authority to order a peremptory nonsuit, against the will of the plaintiff. He had

[* 472] * a right by law to a trial by a jury, and to have had the case submitted to them. He might agree to a nonsuit; but if he did not so choose, the court could not compel him to submit to it. But the state of the record does not enable this court to render a final judgment, because the record is defective in not showing a judgment of nonsuit entered in the circuit court. Although the bill of exceptions states that fact, yet the record does not contain the judgment itself.

The plaintiff may, therefore, apply for a *certiorari* to bring up a perfect record, or dismiss the present writ of error and proceed anew, as his counsel may think best for the interest of their client.

JOHNSON, J., *dissentiente.*

The only question of any importance in this cause is, whether a circuit court can, in any case, order a plaintiff to be nonsuited. I ordered the plaintiff below to be nonsuited because the evidence was so inadequate to maintain his suit; but had the jury found for him, I should have set aside the verdict, and ordered a new trial. The practice of the court from which this cause comes up is this: when the plaintiff has closed his evidence, the defendant is at liberty to move for a nonsuit, or proceed with his testimony. If he introduces evidence it is too late to move for a nonsuit; and the question always to be examined is, whether upon the evidence introduced by the plaintiff, admitting it to be true, the jury can find a verdict for him. So that it is in fact a substitute for a demurrer to evidence, or for a motion for instruction, that the plaintiff cannot recover upon the case made out by him in evidence.

There are several reasons why I must maintain that the courts of the sixth circuit have a right to exercise the power to order a nonsuit even against the will of the plaintiff, and why it would be wise, in all our circuits, to introduce the same practice.

It happens unfortunately for the defendant in error here, that a majority of the judges of this court have pursued a different practice in their circuits; but this, I must insist, is no sufficient reason for subverting, otherwise than by rule, the practice of other States in which this right has been recognized in the administration of justice, coevally with the existence of their courts. Such has been the case in the States of which the sixth circuit consists, and the acts of 1789,[1] and 1792,[2] have adopted into the courts of the United States, of the respective circuits, not only the forms of process, but the "modes of proceeding" in suits known to the States respectively. That this comes under the denomination of a mode of proceeding, or, in other words, an established practice of the State composing the sixth circuit, appears to me incontrovertible.

* By what right, then, can this court reverse a judgment [* 473] of that circuit, founded in a practice thus sanctioned by law? It does seem to me that the defendant below has a right in this judgment, vested by express statute law, and ought not to be put to the expense of this reversal. For what purpose is power given to this court to alter the practice of the circuits by such regulations as

[1] 1 Stats. at Large, 93. [2] Ib. 275.

they may deem expedient, if such practice is not to be held legal until altered by a rule of this court?

This court surely does not mean to decide that such was not the received practice of that circuit; this would be a decision in the teeth of positive fact; and if the purport of the decision be that it is an illegal practice, the immemorial practice itself, and the Process Acts of the United States, furnish an express negative to such a decision.

The idea seems to be that it is a practice inconsistent with the relation in which our circuit courts stand to this court; that ours is not a *Nisi Prius* system, or something to that effect. What then? This court can alter the practice by a rule, but to overturn a judgment that has already been rendered under such a practice, I must respectfully contend approaches very near to *ex post facto* legislation, not adjudication, the province of which is to operate only upon existing laws. But it is not a practice appropriate exclusively to a *Nisi Prius* system, as is proved by this, that writs of error are sued out continually in England upon judgments on nonsuits, (see the cases cited in 1 Archb. Practice, 229–30,) and, though it had been, the States were at liberty to adopt it into their practice, although the *Nisi Prius* system be unknown to them. That they had adopted it is conclusive against this assumed incompatibility. And in practice it subserves the purposes of justice under our system as effectually as a bill of exceptions or a demurrer to evidence, and in several respects much better. It saves the practitioner from the weight of responsibility, which often results from being compelled to elect between a voluntary nonsuit, and a demurrer to evidence, or a bill of exceptions, which may terminate fatally to his client, and it not unfrequently saves his client from the fatal effects of negligence and misapprehension, either of himself or his attorney, or from surprise.

In point of convenience and expedition in the administration of justice I presume there cannot be two opinions. On this point, as far as *exemplum docet*, we may cite Great Britain, Massachusetts, and New York, with some confidence, against Pennsylvania, Maryland, and Virginia.

But it is contended that in England the plaintiff is not nonsuited, if he insists on answering when called. If the fact be admitted, what then? England is not altogether absolute in dictating to
[*474] the courts of the United States, and if those of the * States of the sixth circuit have asserted some independence in their rules of practice on this subject, I presume their right was unquestionable to do so.

But I want no other authority than the courts of Great Britain to justify the practice of the sixth circuit in this behalf. From the

earliest period, we find the English courts in the exercise of this power, and whoever will examine the cases collected in Mr. Morgan's Treatise on the doctrine of new trials, vol. 3, Essays, will find what a very wide range has been taken by those courts in the application of that practice. Nor have the more modern cases manifested any inclination to retrace their steps. Its salutary effects are universally felt, and perhaps contribute as largely as any other cause to the rapid progress of their courts in disposing of their dockets. If there exists any case prior to that of Macbeath *v.* Haldimand, 1 Term Rep. 172, in which the right of the plaintiff to refuse to be nonsuited was recognized, I cannot recollect it; since in that case it would seem that in ordinary cases the right is recognized. But there is abundant proof that the British courts do assert the power to control the exercise of that right by the plaintiff when they think proper. In the cases of change of *venue*, on motion of plaintiffs, 2 Black. 1031, the right is disputed on the assumed ground that he undertakes to prove some material fact. Now, where can be the objection to applying the same reason to every case that goes to a jury? Does not a plaintiff in fact undertake the same thing whenever he troubles a court with his suit, and has a jury sworn to try his cause upon evidence? he is no longer subjected to amercement if he fails to recover, and the right to nonsuit him, where he fails to produce evidence that will justify a verdict, is but a reasonable substitute for the absolute penalty to which he was once subjected.

But it is contended that an absurdity is produced, and an acknowledged right violated. Yet the alternative exhibits a more direct and obvious absurdity; since in the case of Macbeath *v.* Haldimand, and in every case of the kind, the court asserts a positive control over the consciences of the jury, by telling them "they are bound to find for the defendant." And the greater absurdity must henceforward be incurred, of swearing a jury in a cause, and requiring a verdict at the caprice of a plaintiff who produces not a tittle of evidence to maintain his issue. Nor is any right of the plaintiff taken from him if his rights be regarded in their just extent. He cannot claim a verdict of the jury if he does not produce evidence to sustain it, and it is only in that case that he is precluded from submitting his case to their consciences. When we consider what were the ancient penalties for a false verdict, before they were superseded by the introduction of new trials, it must appear just * and reasonable [*475] that the plaintiff should rather be exposed to the necessity of bringing a new suit, or moving for a new trial, than that the jury should be subjected to attaint at his will. And on the subject of fiction and legal absurdity, it is certainly too late at this day for our

courts of justice to be very fastidious on a consideration which has been so thoroughly set at naught by the action of ejectment, fine, and recovery, and sundry other matters of the kind, to which they have resorted for the purposes of substantial justice and public convenience.

I must submit, I suppose, but I cannot do it without protesting against the right of forcing upon my circuit the practice of other circuits in this mode.

By a rule of this court, it is unquestionably in the power of the court to do it. But until then, I can never know what is the practice of my own circuit, until I come here to learn it.

1 P. 476; 6 P. 598.

JAMES D'WOLF, Junior, Plaintiff in Error, *v.* DAVID JACQUES RABAUD, JEAN PHILIPPE FREDERICK RABAUD, ALPHONSE MARC RABAUD, Aliens and Subjects of the King of France, AND ANDREW E. BELKNAP, a Citizen of the State of Massachusetts, Defendants in Error.

1 P. 476.

Where A agreed to ship sugars to B, for account of C, by such vessel as C might designate, — held, that C might empower B to designate the vessel.

A circuit court of the United States cannot order a nonsuit against the will of the plaintiff.

The question of citizenship constitutes no part of the issue upon the merits; it must be raised by a plea to the jurisdiction.

A letter having been written to the defendant by a third person, requesting the defendant to ship sugars to the plaintiff, and the defendant having added to the letter the word "agreed," and signed his name — held, that parol evidence was admissible to prove that the plaintiff agreed to advance moneys to the third person on the faith of the shipment; that this agreement and the letter and the assent of the defendant were parts of one transaction; and the written paper was made for the purpose of being delivered to the plaintiff, and was so delivered; and this being proved, it was further held that the contract of the defendant was not within the statute of frauds of New York.

THE case is stated in the opinion of the court.

Ogden and *Hall*, for the plaintiff.

Webster and *King*, contrà.

[*496] *STORY, J., delivered the opinion of the court.

Messrs. Rabaud, Brothers, and Co., of Marseilles, brought a suit in the circuit court of the southern district of New York, against James D'Wolf, jun., (the plaintiff in error,) to recover damages, for not shipping them 500 boxes of sugar, on account of one George D'Wolf, according to an agreement entered into by him with them. The declaration contained four counts, and in each of them the sub-

stance of the contract stated is, that the defendant, in consideration that one Belknap, (one of the partners in the house of Rabaud, Brothers, and Co.,) would authorize George D'Wolf to draw on the plaintiffs for 100,000 francs, undertook and promised that he would ship for the account of George D'Wolf, on board such vessel as he (George D'Wolf) should direct, five hundred boxes of white Havana sugar, consigned to the plaintiffs, at Marseilles. The declaration then proceeds with the proper averments and breaches necessary to maintain the action. Upon the trial, under the general issue, the jury found a verdict for the plaintiffs, and judgment was given for them accordingly. The cause now comes before this court upon a writ of error and bill of exceptions taken at the trial.

The bill of exceptions is voluminous, and contains, at large, the evidence admitted at the trial, as well as the charge of the *learned judge who presided at the trial. It is unnecessary [*497] to refer to that evidence, or to consider its nature, bearing, and extent, upon which so ample a comment has been made at the bar, except so far as it applies to some question of law decided by the court, to which an exception has been taken. The whole facts were left open to the jury, and, so far as they were imperfect or inconclusive, the defendant has had the full opportunity of addressing his views to the jury, and they have found their verdict against him.

In the progress of the trial, a letter of the 27th December, 1825, written by George D'Wolf to Belknap, was offered by the defendants in evidence, for the purpose of showing an authority from George D'Wolf to Belknap, to direct or name a vessel to the defendant, on board of which the sugars might be shipped. The defendant objected to its admission, and the objection was overruled. This constitutes the first ground of error, now insisted on by the defendant. We are of opinion that the letter was rightly admitted, for both of the reasons stated in the charge. It was evidence of such an authority; and the defendant made no objection to it at the time, on account of any insufficiency in this respect, but put his defence by his letter of the 5th of January, 1826, on an entirely distinct ground.

After the evidence for the plaintiffs was closed, the defendant moved for a nonsuit, which motion was overruled. This refusal certainly constitutes no ground for reversal in this court. A nonsuit may not be ordered by the court, upon the application of the defendant, and cannot, as we have had occasion to decide at the present term, be ordered in any case without the consent and acquiescence of the plaintiff. Elmore *v.* Grymes, *ante*, page 469. In the further progress of the trial, upon the examination of one Frederick G. Bull, a witness for the defendant, the counsel for the defendant offered to

prove, by Bull, that it was an express understanding and agreement between the defendant and George D'Wolf, at the time the letter of the 15th November, 1825, (which will be hereafter more particularly noticed,) was signed by the defendant, that the latter should furnish the defendant with the funds necessary for the purchase of the sugar, before the defendant would be under any obligation to ship the same. This testimony was rejected by the court, unless it should also appear that Belknap was a party thereto, or that the same was brought home to his knowledge. We can perceive no error in this decision. If the defendant had entered into the contract with the plaintiffs, stated in the declaration, and the private arrangement made between the defendant and George D'Wolf, constituted no part of that contract, and was unknown to them, it certainly ought not to prejudice their rights. It was *res inter alios acta*, and had no legal [* 498] * tendency, either to disprove the plaintiff's case or to exonerate the defendant from his liability.

The other exceptions are exclusively confined to the charge given to the jury, upon the summing of the court upon points of law.

The first objection was to the sufficiency of the evidence to establish the citizenship of Belknap, as averred in the declaration. This is now waived by the counsel, and, indeed, could not now be maintained, because it has been recently decided by this court, upon full consideration, that the question of such citizenship constitutes no part of the issue upon the merits, and must be brought forward by a proper plea in abatement, in an earlier stage of the cause.

The great question upon the merits arises upon that part of the charge which relates to the agreement contained in the letter of the 15th of November, 1825, from George D'Wolf to the defendant, and the accompanying assent of the latter, with reference to the statute of frauds.

That letter is in the following terms: —

New York, November 15, 1825.

Mr. James D'Wolf, Jr.

Dear Sir: You will please ship for my account, on board such vessel as I shall direct, five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brothers, and Co., Marseilles, and oblige your friend and obedient servant,

(Signed) George D'Wolf.

Agreed to, (Signed,) James D'Wolf, Jr.

Upon this part of the case, the charge was as follows: "It is said that this letter, under the statute of frauds, does not purport on its face to contain any binding contract on the part of the defendant,

and that the defects cannot be supplied by parol evidence. This objection, I think, cannot be sustained. The first question to be settled, and which is matter of fact for your determination, is, whether the arrangement between Belknap and George D'Wolf, as to the authority to draw on the house in Marseilles, on the shipment and consignment of five hundred boxes of sugar, and the undertaking of the defendant, were made and entered into at one and the same time, so as to form one entire transaction." The judge then proceeded to sum up the evidence on this point, and added: "The consideration for this undertaking was the authority given by Belknap to George D'Wolf, to draw on the plaintiffs for one hundred thousand francs. This consideration, it is true, although fully proved, is not expressed in the written contract. And, one question is, whether it can be supplied by parol evidence; and I think it may, if the undertaking of the defendant was entered into at *the same time [*499] with that between Belknap and George D'Wolf, so as to form one entire transaction. The evidence does not in any manner contradict the written agreement, and is perfectly consistent with it; as between the plaintiffs and George D'Wolf the consideration might be clearly supplied by parol proof; and if the undertaking of the defendant was at the same time, it required no consideration from the plaintiffs to him. The consideration to George D'Wolf was sufficient to uphold and support the contract of the defendant." And he finally stated, if he was mistaken in this view of the evidence, "and the jury should be of opinion that the contract between Belknap and George D'Wolf was completed and unconnected with the engagement of the defendant before he undertook to make the shipment and consignment, then the evidence was not sufficient to maintain the present action. It will then be a collateral undertaking made subsequent to the principal contract, and would require some other consideration than that which supported the principal contract."

The question, then, so far as it was a question of fact, whether the defendant did enter into the asserted agreement with the plaintiffs, and whether it was a part of the original arrangement with George D'Wolf, and upon the original consideration moving from the plaintiffs, was before the jury, and they have found in the affirmative. The question of law remains, whether this was a case within the statute of frauds, so as to prevent parol evidence from being admissible, to charge the defendant.

The statute of frauds of New York is a transcript, on this subject, of the statute of 29th of Charles II. c. 3. It declares "that no action shall be brought to charge a defendant on a special promise for the debt, default, or miscarriage of another, unless the agreement, or

some memorandum or note thereof, be in writing, and signed by the party, or by any one by him authorized." The terms "collateral" or "original" promise, do not occur in the statute, and have been introduced by courts of law to explain its objects and expound its true interpretation. Whether by the true intent of the statute it was to extend to cases where the collateral promise (so called) was a part of the original agreement, and founded on the same consideration moving at the same time between the parties; or, whether it was confined to cases where there was already a subsisting debt and demand, and the promise was merely founded upon a subsequent and distinct undertaking; might, if the point were entirely new, deserve very grave deliberation. But it has been closed within very narrow limits by the course of the authorities, and seems scarcely open for general examination, at least, in those States where the [* 500] English authorities have been fully *recognized and adopted in practice. If A agree to advance B a sum of money, for which B is to be answerable, but at the same time it is expressed upon the undertaking that C will do some act for the security of A, and enter into an agreement with A for that purpose, it would scarcely seem a case of a mere collateral undertaking, but rather, if one might use the phrase, a trilateral contract. The contract of B to repay the money is not coincident with, nor the same contract with C, to do the act. Each is an original promise, though the one may be deemed subsidiary or secondary to the other. The original consideration flows from A, not solely upon the promise of B or C, but upon the promise of both, *diverso intuitu*, and each becomes liable to A, not upon a joint but a several original undertaking. Each is a direct, original promise, founded upon the same consideration. The credit is not given solely to either, but to both; not as joint contractors, on the same contract, but as separate contractors upon coexisting contracts, forming parts of the same general transaction. Of that very nature is the contract now before the court; and if the intention of all the parties was that the letter of the 15th of November should be delivered to Belknap, as evidence of the original agreement between all the parties, and indeed as part execution of it, to bind the defendant not merely to George D'Wolf, but to the plaintiffs, (and so it has been established by the verdict,) then it is not very easy to distinguish the case from that which was put.

But assuming that the true construction of the statute of frauds is, as the authorities seem to support, and that such a promise would be within its purview, it remains to consider whether the arguments at the bar do establish any error in the opinion of the circuit court.

In the first place, there is no repugnance between the terms of that

letter and the parol evidence introduced. The object of the latter was to establish the fact that there was a sufficient consideration for the agreement, and what that consideration was, and also the circumstances under which it was written as explanatory of its nature and objects. Its terms do not necessarily import that it was an agreement exclusively between George D'Wolf and the defendant. If the paper was so drawn up and executed by the assent of all the parties, for the purpose of being delivered to Belknap, as a voucher and evidence to him of an absolute agreement by the defendant to make the shipment, and so was in fact understood by all the parties at the time; there is nothing in its terms inconsistent with such an interpretation. The defendant agrees to the shipment. But with whom? It is said with George D'Wolf alone; but that does not necessarily follow, because it is not an instrument in its terms *inter partes*. If the parties intended that it should express the joint assent * of George D'Wolf and the defendant to the [* 501] shipment, and it was deliverable to Belknap accordingly, as evidence of their joint assent that it should be made upon the terms and in the manner stated in it there is nothing which contradicts its proper purport; and it is then precisely what the parties require it to be. It was for the jury to say whether the evidence disclosed that as the true object of it, and to give it effect accordingly, as proof of an agreement in support of the declaration. The case of Sargent *v.* Morris, 3 Barn. & Ald. 277, furnishes no uninstructive analogy for its admission.

In the next place, was the parol evidence inadmissible to supply the defect of the written instrument, as to the consideration and *res gestæ*, between the parties. The case of Wain *v.* Warlters, 5 East, 10, was the first case which settled the point that it was necessary, to escape from the statute of frauds, that the agreement should contain the consideration for the promise, as well as the promise itself. If it contained it, it has since been determined that it is wholly immaterial whether the consideration be stated in express terms, or by necessary implication. That case has from its origin encountered many difficulties, and been matter of serious observation both at the bar and on the bench in England and America. After many doubts, it seems at last in England, by the recent decisions of Saunders *v.* Wakefield, 4 Barn & Ald. 595, and Jenkins *v.* Reynolds, 3 Brod. & Bing. 14, to have settled down into an approved authority. It has not, however, received a uniform recognition in America, although in several of the States, and particularly in New York, it has to a limited extent been adopted into its jurisprudence, as a sound construction of the statute. On the other hand, there is a very elaborate opinion of the supreme

court of Massachusetts, in Packard *v.* Richardson, 17 Mass. 122, where its authority was directly overruled. What might be our own view of the question, unaffected by any local decision, it is unnecessary to suggest; because the decisions in New York upon the construction of its own statute, and the extent of the rules deduced from it, furnish, in the present case, a clear guide for this court. In the case of Leonard *v.* Vredenburgh, 8 Johns. R. 29, Mr. Chief Justice Kent, in delivering the opinion of the court, adverting to the fact that that case was one of a guarantee or promise collateral to the principal contract, but made at the same time, and becoming an essential ground of the credit given to the principal or direct debtor, added, "and if there was no consideration other than the original transaction, the plaintiff ought to have been permitted to show that fact, if necessary, by parol proof; and the decision in Wain *v.* Warlters did not stand in the way."

One of the points in that case was, whether the parol [* 502] proof * of the consideration was not improperly rejected at the trial; and the decision of the court was, that it ought to have been admitted. It is not therefore, as was suggested at the argument, a mere *obiter dictum*, uncalled for by the case. It was one, though not the only one, of the points in judgment before the court. The same doctrine has been subsequently recognized by the same court, in Bailey *v.* Freeman, 11 Johns. R. 221, and in Nelson *v.* Dubois, 13 Johns. R. 175.

It does not seem necessary to pursue this subject further, because here is a clear authority, justifying the admission of the parol evidence upon the principle of the local jurisprudence. It seems to us a reasonable doctrine, founded in good sense and convenience, and tending rather to suppress than encourage fraud. But, whether so or not, it sustains the opinion of the circuit court, in a manner entirely free from exception.

The next objection to the charge founded on the variance between the declaration and proofs has been abandoned at the argument, and need not be dwelt upon. And the last objection, to wit: To the designation of a vessel for the shipment as ineffectually made, has been already in part answered, and we entirely coincide with the views expressed on this point, by the circuit court.[1]

[1] The charge of the learned judge, on this point, was as follows:—

The next inquiry is, whether any vessel was designated to receive the sugars according to the terms of the agreement. By the contract, the sugars were to be shipped on board such vessel as George D'Wolf should direct. He, having become insolvent, wrote a letter to Belknap, authorizing him to make arrangement with the defendant on this subject, and to designate the vessel, which he accordingly did, and gave notice

Without, therefore, going more at large into the points of the case, or commenting upon the various authorities and principles so elaborately brought out in the discussions at the bar, it is sufficient to say, that we perceive no error in the judgment of the circuit court, and it is therefore to be affirmed, with costs.

2 P. 170; 6 P. 598; 7 H. 198; 14 H. 218, 505; 19 H. 393.

JOHN DAVIS and others, Plaintiffs in Error, *v.* RICHARD B. MASON, Lessee.

1 P. 503.

In Kentucky, seisin in deed is not essential to a tenancy by the courtesy, if the lands were vacant—seisin in law is sufficient.

Though the statute of Kentucky requires two subscribing witnesses to a will of lands, the evidence of one may prove the will.

ERROR to the circuit court of the United States for the district of Kentucky. The case is stated in the opinion of the court.

Rowan, for the plaintiffs.

Wickliffe, contrà.

*JOHNSON, J., delivered the opinion of the court. [*505]

The plaintiffs here were defendants below to an action of ejectment brought to recover eight thousand acres of land lying in the State of Kentucky.

The law of real estates in Kentucky, therefore, is the law of this court, in deciding on the rights of the parties. The plaintiffs below derive title under, 1. A patent to George Mason, of Gunston, issued in 1787. 2. A deed of bargain and sale from seven out of nine legal representatives of the patentee, their brother, to George Mason, of Lexington, executed in 1794. 3. A codicil to the will of George

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thereof to the defendant, and demanded the shipment of the sugars. This was amply sufficient. The authority reserved to George D'Wolf, to direct in what vessel the shipment should be made, was for his benefit, which he might waive. He was not bound personally to designate such vessel; he might do this by his agent, and the authority given to Belknap was constituting him such agent for that purpose; and the act of Belknap, in this respect, was, in judgment of law, the act of George D'Wolf; and it is in proof that the vessel designated was in every respect fitted for the purpose. Nor was any objection made by the defendant at the time on this ground; but he declined making the shipment, because George D'Wolf had not furnished him with funds to purchase the sugars; and the objection that the vessel was not designated by George D'Wolf cannot now be set up. The act of his agent was his act, and the evidence, therefore, fully supports the contract as laid in the declaration.

Mason, of Lexington, devising the premises to the lessor of the plaintiffs. Judgment was rendered for plaintiffs to recover eight ninths of the premises. The defendants below relied on their possession, affecting to claim through the patent to the elder Mason, but adducing no evidence to connect themselves with it. The questions to be here decided are brought up by a bill of exceptions, taken by the defendants below, and they will be considered, as they regard the deduction of title, in the order in which they have been stated above.

The first question in this order relates to the deed executed by the representatives of Mason the elder to Mason the younger, under whose will the lessor of the plaintiffs makes title. No exception was taken to the proof upon which this deed went to the jury. The exceptions go to the nature and extent of the estate which passed under it. And first, it was insisted that it could pass nothing, unless the plaintiffs should show that the land sued for was entered after George Mason, senior, made his will, and not patented at his death; on the ground that, otherwise, it passed under his will, and did not descend to these donors.

But it is obvious that this instruction was properly refused, since the fact nowhere appears in the record that the elder Mason ever made a will competent in law to transfer real estate. The deed, it is true, purports to carry into effect his intentions towards his children; but *non constat*, whether that intention had ever been signified otherwise than by parol or by an informal will. If a will had ever been executed with the formalities necessary to defeat the heir at law, the defendants should have availed themselves of it by proof.

The next instruction prayed for by the defendants, and rejected by the court, was, "that if from the evidence the jury believed that the daughters of the patentee were dead before the suit was brought, that then they ought to find for defendants, as to the undivided interest of such daughters, and that the deed did not pass their [*506] interest. The court instructed the *jury that the deed did not pass the interest of the daughters, but passed the interest of their husbands, who were tenants by courtesy, although they had never had other or further possession of the land than what they acquired by deed.

To understand this part of the bill of exceptions, it is necessary to notice that, from the record, it appears that among the parties of the first part to the deed to G. Mason the younger, were four daughters of G. Mason the elder, and their husbands; that the daughters had formally executed a release of inheritance under a commission issued from a court in Virginia, but, because the States were then separated, as a judicial proceeding, it had no validity as to lands in Kentucky,

and the lessor of the plaintiffs was compelled to stand upon the interest conveyed to him by the deeds of the husbands as tenants by the courtesy.

In order to prove the pedigree of the donors, the marriage, birth of issue, &c., and of the sons-in-law of the elder Mason, the testimony of two witnesses was introduced by plaintiffs, taken under the act of congress. To the introduction of this testimony an objection was made and overruled, and this constituted another ground of exception; which, however, has been very properly waived by the counsel in argument here. It appears that the requisitions of the act have been well complied with.

This testimony, besides establishing the pedigree, marriage, and birth of issue, &c., of the husbands and their wives, and identity of the lessor of the plaintiffs, as devisees of G. Mason the younger, also goes to prove the death of some, if not of all the daughters; and the exception is intended to raise the question, whether, in the absence of evidence of actual seisin, the husbands had good estates as tenants by the courtesy in the portions of the land belonging to their respective wives; if they had not, then by the death of their wives, their estates were determined. To repel this objection to the vesting of the estate by the courtesy, evidence is introduced into the bill of exceptions to prove that "the adverse possession of the premises, relied on by the defendants, did not commence until after the execution of the deed, and after the death of George Mason; in other words, that the land was waste, or as is sometimes styled, wild lands," at the time of executing the deed, and at all times before and down to the time of the devise, from George Mason, jun., to the lessors of the plaintiff took effect.

It is believed that the rigid rules of the common law have never been applied to a wife's estate in lands of this description. In the State of New York, 8 Johns. R. 271, these rules have been solemnly repelled; and we know of no adjudged case in any of the States, in which they have been recognized as *applicable. [*507] It would, indeed, be idle to compel an heir or purchaser to find his way through pathless deserts into lands still overrun by the aborigines, in order to "break a twig," or "turn a sod," or "read a deed," before he could acquire a legal freehold. It may be very safely asserted that had a similar state of things existed in England when the conqueror introduced this tenure, the necessity of actual seisin, as an incident to the husband's right, would never have found its way across the channel.

It is true that Perkins and Littleton, and other authors of high antiquity and great authority lay down the necessity of actual seisin,

in very strong terms, and exemplify it by cases which strikingly illustrate the doctrine. But even they do not represent it as so unbending as to be uncontrolled by reason.

The distinction is taken between things which lie in livery and things which lie in grant; and with regard to the latter, the seisin in law is enough, because they admit of no other; and as Lord Coke observes, "the books say it would be unreasonable the husband should suffer, for what no industry of his could prevent;" and further, "that the true reason is that the wife has those inheritances which lie in grant and not in livery, when the right first descends upon her, for she hath a thing in grant when she has a right to it, and nobody else interposes to prevent it." And in another place he says, "a husband shall be tenant by courtesy, in respect of his wife's seisin in law, where it was impossible for him to get an actual seisin;" for "the favor which the law shows to the husband that has issue by his wife shall not be lost without some default in him." So when describing what is livery of seisin, and defining the distinction between livery and deed and livery in law, he says of the latter, "if the feoffee claims the land as near as he dares to approach it, for fear of death or battery, such entry in law shall execute the livery in law."

And as a proof that even in his time the common law had begun to untrammel itself of the rigorous rule, that livery of seisin or entry was indispensable to vesting a freehold, the fact may be cited that livery of seisin was held unnecessary to a fine, devise, surrender, release, or confirmation to lessee for years. The mode of conveyance, by lease and release, and some other modes, it is well known, arose out of an effort to disembarrass the transfer of titles of an idle form, which had survived the feudal system.

As it relates to the tenure by courtesy, the necessity of entry grew out of the rule which invariably existed, that an entry must be made in order to vest a freehold, Co. Lit. 51, and out of that member of the definition of the tenure by courtesy, which requires that it should be inheritable by the issue. When a descent was cast, the entry
[*508] of the mother was necessary, or the *heir made title direct from the grandfather, or other person last seised.

But in Kentucky, we understand, the livery of seisin is unheard of. Freeholds are acquired by patent, or by deed, or by descent, without any further ceremonies; and in tracing pedigree the proof of entry, as successive descents are cast, is never considered as necessary to a recovery, or in any mode affecting the course of descent.

If a right of entry therefore exists, it ought, by analogy, to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists; as it is laid down in the books relative to a seisin

in law, "he has the thing, if he has a right to have it." Such was not the ancient law; but the reason of it has ceased. It has been shown that, in the most remote periods, exceptions had been introduced on the same ground; and in the most modern, the rule has been relaxed upon the same consideration. We ought not to be behind the British courts in the liberality of our views on the subject of this tenure. A husband, formerly, could not have courtesy of an use; that is, where his wife was *cestui que use*, (Perkins's Courtesy, fo. 89,) and this continued to be the law down to the time of Baron Gilbert. Law of Uses and Trusts, 239. At present, it is fully settled in equity that the husband shall have courtesy of a trust, as well as of a legal estate; (2 Vern. 536; 1 P. W. 108; 1 Atk. 606;) of an equity of redemption, a contingent use; or money to be laid out in lands.

The case made out in the bill of exceptions is one in which there could not possibly have been any default in the husbands, since the disseisin by defendants did not take place until after the death of George Mason, Jr., and of consequence after the transfer of title by the husbands, and after the devise took effect in favor of the plaintiff's lessor.

These points being disposed of, it only remains to consider the questions raised upon the introduction of the will of George Mason, Jr., or rather of the codicil, under which the lessor of the plaintiffs makes title.

Under a law of the State of Kentucky, and the decision of their courts upon it, a will with two witnesses is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another State, is good evidence of the execution of the will.

The objection here is, that it does not appear from the exemplified copy that this codicil was duly proved; because the probate does not go to that codicil, but to another; and, secondly, because it appears to have been admitted to record on the testimony of a single witness.

* The probate purports "that the two codicils were proved [*509] by the oath of Daniel M'Carty." From the exemplification, it appears that at three several dates the testator added to his will what he calls codicils; but as there is no signature to the first, we are satisfied that the first and second were well considered as making but one; and, therefore, that the probate, although purporting to go to two codicils only, was well considered as going to this; which, but for the want of the signature to the first, would have been the third codicil. What is decisive on this subject is, that the first two codicils have no subscribing witness, distinct from the last; and the name

of M'Carty, the witness sworn, is subscribed to the second, or as the defendants contend it should be considered, to the third codicil.

With regard to the second exception to the sufficiency of the proof of this codicil, it can only be necessary to resort to adjudged cases, as they seem conclusive to this point.

There were two witnesses to this codicil, to wit, Thompson Mason and M'Carty. M'Carty only was sworn, and the probate upon which it was ordered to be recorded, imports that the two codicils were proved by the oath of Daniel M'Carty. In the case of Harper et al. *v.* Wilson et al., decided in the court of appeals of the State of Kentucky, in 1820, (2 A. K. Marsh, 465,) in which the right to lands was in controversy, the probate was in these words: "This will was produced in court, proved by the oath of Sarah Harper, a subscribing witness thereto, and ordered to be recorded." There was another subscribing witness to the will, and exception was taken to the sufficiency of the proof. The language of the court in that case was: "As to the proof of the execution of the will, it need only be remarked that its admission to record is sufficient to show that the witness, by whom it was proven in that court, established every fact essential to its due execution; and it is a settled rule, that, although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it." 2 Marshall, 467. The same doctrine has been since fully recognized in the case of Turner *v.* Turner, 1 Litt. Rep. 103, adjudged in the same court in 1822; and the identity of the certificate and facts in this case with those in the case of Harper *v.* Wilson, leaves nothing for this court to deliberate upon.

There is spread upon the record a considerable body of testimony, taken by the court, by which the will had been previously admitted to record, and which, upon the face of it, appears to have been taken in order to remove all doubt on the sufficiency of the will and authenticity of the attestations to it. But as it does not appear to [*510] have been followed up by any order * of that court, it was not taken into view in the bill of exceptions, and made no part of the evidence in the court below. It therefore only required this remark in order to prevent any misapprehension on this point.

We are of opinion that there was no error in the judgment below, and that it be affirmed, with costs.

THE AMERICAN INSURANCE COMPANY, AND THE OCEAN INSURANCE COMPANY, of New York, Appellants, *v.* 356 BALES OF COTTON. David Canter, Claimant and Appellee.

1 P. 511.

A court erected by the territorial legislature of Florida to try and determine cases of salvage, is in conformity with the constitution and laws of the United States.

A case in admiralty is not "a case arising under the constitution and laws of the United States," within the meaning of the 8th section of the act of March 3, 1823, (3 Stats. at Large, 752,) to amend the act organizing the Territory of Florida.

Whether the power of congress to govern the territories is derived from the right of the United States to acquire territory, or from that clause in the constitution which empowers congress "to make all needful rules and regulations concerning the territory and other property of the United States," the possession of the power is unquestioned.

A territorial court, held by judges whose appointments are for four years, cannot be the depositary of any part of the judicial power conferred by the constitution on the general government.

THE case is stated in the opinion of the court.

Ogden, for the appellants.

Whipple and *Webster*, contrà.

*MARSHALL, C. J., delivered the opinion of the court. [*541]

The plaintiffs filed their libel in this cause in the district court of South Carolina, to obtain restitution of 356 bales of cotton, part of the cargo of the ship Point a Petre; which had been insured by them on a voyage from New Orleans to Havre de Grace, in France. The Point a Petre was wrecked on the coast of Florida, the cargo saved by the inhabitants, and carried into Key West, where it was sold for the purpose of satisfying the salvors; by virtue of a decree of a court consisting of a notary and five jurors, which was erected by an act of the territorial legislature of Florida. The owners abandoned to the underwriters, who having accepted the same, proceeded against the property, alleging that the sale was not made by order of a court competent to change the property.

David Canter claimed the cotton as a *bonâ fide* purchaser, under the decree of a competent court, which awarded seventy-six per cent. to the salvors on the value of the property saved.

The district judge pronounced the decree of the territorial court a nullity, and awarded restitution to the libellants of such part of the cargo as he supposed to be identified by the evidence, deducting therefrom a salvage of fifty per cent.

The libellants and claimant both appealed. The circuit court reversed the decree of the district court, and decreed the whole cotton to the claimant, with costs, on the ground that the proceedings of

the court at Key West were legal, and transferred the property to the purchaser.

From this decree the libellants have appealed to this court.

The cause depends mainly on the question whether the property in the cargo saved, was changed by the sale at Key West. The conformity of that sale to the order under which it was made has not been controverted. Its validity has been denied, on the ground that it was ordered by an incompetent tribunal.

The tribunal was constituted by an act of the territorial legislature of Florida, passed on the 4th July, 1823, which is inserted in the record. That act purports to give the power which has been exercised; consequently, the sale is valid, if the territorial legislature was competent to enact the law.

The course which the argument has taken, will require
[* 542] that, * in deciding this question, the court should take into view the relation in which Florida stands to the United States.

The constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly created power of the state.

On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession[1] contains the following provision: "The inhabitants of the territories which his Catholic majesty cedes to the United States by this treaty, shall be incorpo-

[1] 8 Stats. at Large, 252.

rated in the Union of the United States, as soon as may be consistent with the principles of the federal constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the mean time, Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution which empowers congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United * States. The [* 543] right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, congress, in 1822, passed "an act for the establishment of a territorial government in Florida,"[1] and on the 3d of March, 1823, passed another act to amend the act of 1822. Under this act, the territorial legislature enacted the law now under consideration.

The 5th section of the act of 1823 creates a territorial legislature, which shall have legislative powers over all rightful objects of legislation; but no law shall be valid which is inconsistent with the laws and constitution of the United States.

The 7th section enacts "that the judicial power shall be vested in two superior courts, and in such inferior courts and justices of the peace as the legislative council of the territory may from time to time establish. After prescribing the place of cession, and the jurisdictional limits of each court, the act proceeds to say: "Within its limits herein described, each court shall have jurisdiction in all criminal cases, and exclusive jurisdiction in all capital offences, and original jurisdiction in all civil cases of the value of one hundred dollars, arising under and cognizable by the laws of the territory now in force therein, or which may at any time be enacted by the legislative council thereof."

[1] 3 Stats. at Large, 654.

The 8th section enacts "that each of the said superior courts shall moreover have and exercise the same jurisdiction within its limits, in all cases arising under the laws and constitution of the United States, which, by an act to establish the judicial courts of the United States, approved the 24th of September, 1789,[1] and an act in addition to the act entitled an act to establish the judicial courts of the United States, approved the 2d of March, 1793,[2] was vested in the court of Kentucky district."

The powers of the territorial legislature extend to all rightful objects of legislation, subject to the restriction that their laws shall not be "inconsistent with the laws and constitution of the United States." As salvage is admitted to come within this description, the act is valid unless it can be brought within the restriction.

The counsel for the libellants contend that it is inconsistent with both the law and the constitution; that it is inconsistent with the provisions of the law by which the territorial government was created, and with the amendatory act of March, 1823. It vests, they say, in an inferior tribunal a jurisdiction which is, by those acts, vested exclusively in the superior courts of the territory.

[* 544] * This argument requires an attentive consideration of the sections which define the jurisdiction of the superior courts.

The 7th section of the act of 1823 vests the whole judicial power of the territory "in two superior courts, and in such inferior courts and justices of the peace as the legislative council of the territory may from time to time establish." This general grant is common to the superior and inferior courts, and their jurisdiction is concurrent, except so far as it may be made exclusive in either by other provisions of the statute. The jurisdiction of the superior courts is declared to be exclusive over capital offences; on every other question over which those courts may take cognizance by virtue of this section, concurrent jurisdiction may be given to the inferior courts. Among these subjects are "all civil cases arising under and cognizable by the laws of the territory now in force therein, or which may at any time be enacted by the legislative council thereof."

It has been already stated that all the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recognizes this principle by using the words "laws of the territory now in force therein." No laws could then have been in force but those enacted by the Spanish

[1] 1 Stats. at Large, 73. [2] Ib. 333.

government. If among these a law existed on the subject of salvage, and it is scarcely possible there should not have been such a law, jurisdiction over cases arising under it was conferred on the superior courts, but that jurisdiction was not exclusive. A territorial act, conferring jurisdiction over the same cases on an inferior court, would not have been inconsistent with this section.

The 8th section extends the jurisdiction of the superior courts in terms which admit of more doubt. The words are: "That each of the said superior courts shall, moreover, have and exercise the same jurisdiction within its limits, in all cases arising under the laws and constitution of the United States, which, by an act to establish the judicial courts of the United States, was vested in the court of the Kentucky district."

The 11th section of the act declares "that the laws of the United States relating to the revenue and its collection, and all other public acts of the United States not inconsistent or repugnant to this act, shall extend to and have full force and effect in the territory aforesaid."

The laws which are extended to the territory by this section were either for the punishment of crime or for civil * pur- [* 545] poses. Jurisdiction is given in all criminal cases by the 7th section; but in civil cases that section gives jurisdiction only in those which arise under and are cognizable by the laws of the territory. Consequently, all civil cases arising under the laws which are extended to the territory by the 11th section, are cognizable in the territorial courts by virtue of the 8th section; and, in those cases, the superior courts may exercise the same jurisdiction as is exercised by the court for the Kentucky district.

The question suggested by this view of the subject, on which the case under consideration must depend, is this:—

Is the admiralty jurisdiction of the district courts of the United States vested in the superior courts of Florida, under the words of the 8th section, declaring that each of the said courts "shall, moreover, have and exercise the same jurisdiction within its limits, in all cases arising under the laws and constitution of the United States," which was vested in the courts of the Kentucky district?

It is observable that this clause does not confer on the territorial courts all the jurisdiction which is vested in the court of the Kentucky district, but that part of it only which applies to "cases arising under the laws and constitution of the United States." Is a case of admiralty of this description?

The constitution and laws of the United States give jurisdiction to the district courts over all cases in admiralty; but jurisdiction over

the case does not constitute the case itself. We are, therefore, to inquire whether cases in admiralty and cases arising under the laws and constitution of the United States are identical.

If we have recourse to that pure fountain from which all the jurisdiction of the federal courts is derived, we find language employed which cannot well be misunderstood. The constitution declares that "the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction."

The constitution certainly contemplates these as three distinct classes of cases; and, if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them in the constitution is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the constitution or laws of the United [* 546] States. These cases * are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise. It is not, then, to the 8th section of the territorial law that we are to look for the grant of admiralty and maritime jurisdiction to the territorial courts. Consequently, if that jurisdiction is exclusive, it is not made so by the reference to the district court of Kentucky.

It has been contended that, by the constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of this judicial power must be vested "in one supreme court and in such inferior courts as congress shall from time to time ordain and establish." Hence, it has been argued that congress cannot vest admiralty jurisdiction in courts created by the territorial legislature.

We have only to pursue this subject one step further to perceive that this provision of the constitution does not apply to it. The next sentence declares that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior." The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables

congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the 3d article of the constitution, the same limitation does not extend to the territories. In legislating for them, congress exercises the combined powers of the general and of a state government.

We think, then, that the act of the territorial legislature erecting the court by whose decree the cargo of The Point a Petre was sold, is not "inconsistent with the laws and constitution of the United States," and is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the circuit court, awarding restitution of the property to the claimant, ought to be affirmed, with costs.

3 P. 307; 12 P. 72; 14 P. 353, 526; 9 H. 235; 15 H. 451; 16 H. 164; 17 H. 284, 525; 19 H. 393.

The United States *v.* 422 Casks of Wine. Hazard and Williams Claimants.

1 P. 547.

This court does not consider a point open for discussion which has been once deliberately decided.

A claim having been admitted, the prosecutor must file an exceptive allegation, if the proceeding be in the admiralty, or a plea in abatement, if it be by an information at law, in order to put in issue the claimants' right to appear.

The court may, in its discretion, refuse to restore property to a claimant, if the evidence at the hearing shows he ought not to receive it, though no forfeiture be decreed.

The case is stated in the opinion of the court.

Writ, (attorney-general,) for the United States.

Ogden and *Hall*, contrà.

* Story, J., delivered the opinion of the court. [* 549]

This is the same cause which came before this court at February term, 1823, and is reported in 8 W. 391. The cause having been remanded to the district court of Louisiana for further proceedings, the libel or information was there amended, so as to become technically an exchequer information of seizure; and the parties being at issue upon the question of forfeiture, the jury returned a verdict

for the claimants, upon which judgment was rendered in their favor. Upon the writ of error now brought up on this last judgment, two grounds for reversal have been asserted in the assignment of errors spread upon the record, and the attorney-general has now submitted them, after a brief exposition, to the consideration of the court.

The first is in substance the same question which was decided by this court upon the former appeal, and is presented in the shape of a reargument by the district attorney. Upon this, it is unnecessary to say more, than that we adhere to the opinion formerly expressed, and can perceive no reason for changing it. It is not the habit of this court to consider points again open for discussion, which have been once deliberately decided, and have furnished the groundwork of the judgment already rendered in the same cause, in a former stage of its presentation here.

The second ground is, that Messrs. Hazard and Williams, in whose behalf the claim in this case was interposed, are not the real owners of the wine under seizure, but the same was owned by one Charles Hall; so that the claimants are not entitled to any judgment of restitution.

This objection is founded upon a mistaken view of the time, nature, and order of the proceedings proper in suits *in rem*, whether arising on the admiralty or exchequer side of the court. In such suits, the claimant is an actor, and is entitled to come before the court in that character only in virtue of his proprietary interest in the thing in controversy; this alone gives him a *persona standi in judicio*. It is necessary that he should establish his right to that character, as a preliminary to his admission as a party, *ad litem*, capable of sustaining the litigation. He is therefore in the regular and proper course of practice, required in the first instance, to put in his claim upon oath, averring in positive terms his proprietary interest. If he refuses so to do, it is a sufficient reason for a rejection of his claim. If the claim be made through the intervention of an agent, the agent is in like manner required to make oath to his belief of the verity of the claim; and if necessary, he may also be required to pro-

[*550] duce and prove his authority, before he *can be admitted to put in the claim. If this is not done, it furnishes matter of exception, and may be insisted upon by the adverse party, for the dismissal of the claim. If the claim be admitted upon this preliminary proof, it is still open to contestation, and, by a suitable exceptive allegation in the admiralty, or by a correspondent plea in the nature of a plea in abatement to the person of the claimant, in the exchequer, the facts of proprietary interest, sufficient to support the claim, may be put in contestation, and formally decided. It is in this stage

of the proceedings, and in this only, that the question of the claimant's right is generally open for discussion. If the claim is admitted without objection, and allegations or pleadings to the merits are subsequently put in, it is a waiver of the preliminary inquiry, and an admission that the party is rightly in court, and capable of contesting the merits. If, indeed, it should afterwards appear upon the trial, even after the merits have been disposed of in favor of the claimants, that the claimant had in reality no title to the property; but that the same was the property of a third person, who was not represented by the claimant, or had an adverse interest, or whose rights had been defrauded, it might still be the duty of the court to retain the property in its own custody, until the true owner might have an opportunity to interpose a claim, and receive it from the court. But such cases can rarely occur; and are applications to the discretion of the court, for the furtherance of justice; and, in no shape matters, which the original *promovent* could have a right to require at its hands.

From this review of the practice, as to claims in proceedings *in rem*, it is obvious that the objection now relied on, however apparent it might be from the evidence disclosed upon the record, could not be insisted on as matter of error. In a strict sense, however, this being a writ of error upon an exchequer information tried by a jury, the evidence given at the trial is not properly before us; and as a common law proceeding, the affidavit of Mr. Henner constitutes no part of the record. But, even if that affidavit were admissible, and the objection were now open, it is by no means clear, that it would be available. The property was by the consent of Hall sold and conveyed to Messrs. Hazard and Williams, in trust for himself. If that conveyance was fraudulent as to creditors, it was not absolutely void, and only voidable by them. And, at all events, we cannot but see that they had full authority to interpose this claim, by the consent of the real owner; and the irregularity, if any, prejudices no adverse right, and interferes with no rule of justice.

The judgment of the district court must therefore be affirmed. But a certificate of probable cause of seizure *will [* 551] be granted, as such probable cause is not denied to exist, and indeed is apparent from the verdict of the first jury.

7 H. 833.

ROBERT STEELE'S LESSEE, Plaintiff in Error, *v.* JESSE SPENCER and others, Defendants in Error.

1 P. 552.

By the statutes of Ohio, an unrecorded deed is void as against one to whom the grantor was decreed by a court of chancery to make a title, such decree operating as a conveyance. The question whether an alteration was made in a deed is for the jury; whether an alteration, if made, was material, is for the court.

THE case is stated in the opinion of the court.

Leonard, for the plaintiff.

Ewing, contrà.

[* 557] * TRIMBLE, J., delivered the opinion of the court.

This writ of error is prosecuted to reverse a judgment of the circuit court for the district of Ohio, rendered in favor of the defendants in an action of ejectment instituted by the plaintiff in error against the defendants in the court below to recover a tract of land in Perry county.

On the trial of the general issue which was joined between the parties, the plaintiff gave in evidence a patent from the President of the United States to Jesse Spencer, dated the 15th of November, 1811, for the land in controversy; a deed of conveyance for the land from Jesse Spencer to William Steele, purporting to bear date the 20th of January, 1818, and also a deed from William Steele to Robert Steele dated the 7th of July, 1821, prior to the institution of the suit.

It appeared from a certificate on the deed from Jesse Spencer to William Steele, that it had been acknowledged on the day of its date before a justice of the peace, and it was attested by two subscribing witnesses.

The deed from Jesse Spencer to Steele had never been recorded either in the county where the land lies or elsewhere. Wherever the name of William Steele appeared in the body of the deed or in the label thereon, it appeared to have been written over an erasure, and with ink of a different color, as did the words Ross and Ohio, in describing the place of residence of Steele. This was unaccounted for by any testimony in the cause.

[* 558] * The defendants gave in evidence a record and decree of the supreme court of the State of Ohio, in a cause in which the heirs of Thomas Spencer and the defendants in this cause were complainants, and Jesse Spencer, the patentee of the land, was defendant.

This decree was rendered by the supreme court on the 3d of January, 1820, while sitting in Ross county, having heard the cause in Perry county, where the suit was instituted and where the land lies; and having held it under an advisement, as is the practice in Ohio, the decree was pronounced in the cause at Ross county, and was certified from thence to Perry county, to be there entered on record in the suit in the same manner as if rendered while the supreme court was sitting in Perry county, and it was so entered on record accordingly.

The decree was also recorded in the office of the recorder of deeds on the 24th of July, 1822, in Perry county.

The decree *inter alia* ordered Jesse Spencer, the patentee of the land, "within six months from the date of the decree, to make out a deed with covenants of general warranty conveying to the complainants in that cause and defendants in this, an undivided nine parts out of ten or nine tenths of the tract of land in controversy; and to deposit said deed duly executed, acknowledged, and attested, with the clerk of the supreme court of the county of Perry within the said term of six months; and by the clerk to be delivered to the complainants upon their paying and depositing with the clerk within the said term of six months, certain sums of money, with interest, as specified in the decree; and that upon the failure of the said Jesse Spencer to make out and deposit a deed as above directed within the said term of six months, that then and in that case the complainants shall hold, possess, and enjoy, nine tenths of the said tract of land in as full and ample a manner as if the same were conveyed to them by the said Jesse Spencer."

The defendants paid and deposited with the clerk the money required by the decree within the six months, and took his receipt for the same.

It appears by a bill of exceptions tendered by the plaintiff's counsel, that, after the evidence was closed, the counsel of the defendants moved the court to instruct the jury, 1. That the decree of the supreme court of the State of Ohio given in evidence by the defendants, vested in them such a legal title to the land in question as would have been vested by a conveyance from Jesse Spencer of equal date; and that the Registry Act of Ohio applies as well to the title of the defendants under said decree, as it would do if they held under a *bonâ fide* deed of the same date from the patentee.

*2. That if the elder deed be not recorded within the time [* 559] specified by the Registry Act of Ohio, it is wholly void as to subsequent *bonâ fide* purchasers without notice of the existence of such deed.

3. That if the deed from Jesse Spencer to William Steele was

altered in a material point after it was sealed, attested, and acknowledged, such alteration absolutely avoids the deed; and it can convey no title to the lessor of the plaintiff; which instructions the court gave and the plaintiff excepted.

The counsel for the plaintiff relies on the following points for a reversal of the judgment: —

1. The court below erred in charging the jury that the Registry Act of Ohio applies as well to the title of the defendants under the decree set forth in the bill of exceptions, as if they held under a *bonâ fide* deed of the same date.

2. That the court below erred in charging the jury that if the deed from Jesse Spencer to William Steele was altered in a material part, after it was sealed, attested, and acknowledged, such alteration absolutely avoids the deed, and it can pass no title to the lessor of the plaintiff.

The propriety of the first instruction given by the court to the jury, admits not of a doubt. The statute of Ohio, entitled "an act directing the mode of proceeding in chancery," declares: "That where a decree shall be made for a conveyance, release, or acquittance, &c., and the party against whom the decree shall pass shall not comply therewith by the time appointed, then such decree shall be considered and taken in all courts of law and equity, to have the same operation and effect, and be as available as if the conveyance, release, or acquittance, had been executed conformably to such decree." Land Laws for Ohio, 296.

The Registry Act of Ohio directs that all deeds made within the State, shall be recorded "within six months from the actual time of signing or executing of such deeds;" and declares, that if any such deed shall not be recorded in the county where the land lies within the time allowed by the act, "the same shall be deemed fraudulent against any subsequent *bonâ fide* purchaser for valuable consideration without notice of such deed."

In the construction of registry acts, the term "purchaser" is usually taken in its technical, legal sense. It means a complete purchaser; or, in other words, a purchaser clothed with the legal title. The meaning of the statute is, that an unrecorded deed shall, after the expiration of the time limited by the statute, be deemed fraudulent and void, as against all subsequent purchasers who may have obtained the legal title for valuable consideration without
[* 560] notice. The case of the *defendants is then within the terms of the Registry Act. They obtained their decree, and paid the purchase-money directed by the decree without notice; and the decree had obtained, by operation of the statute, all the attributes of a perfect legal title.

The argument for the plaintiff on this branch of the case, was founded on a supposition that, to bring the defendant's case within the terms of the Registry Act, it must be shown that their title has been recorded as a deed, and their title being not a deed but a decree, it is insisted they are not within the terms of the statute. This is a mistake. The plaintiff's deed not being recorded, the statute avoids it, in terms, as against all subsequent purchasers for valuable consideration without notice, whether their titles be recorded or not. If the defendants had held under a conveyance executed by Jesse Spencer in obedience to the decree, their title-deed, although not recorded, would, by the terms of the statute, prevail against the plaintiff's prior unrecorded deed. A deed not being recorded avoids it as against subsequent, but not as against prior purchasers. By the laws of the State of Ohio, the decree obtained by the defendants, clothes them with the legal title in as ample a manner as a deed. They are purchasers for valuable consideration without notice; and are, therefore, not only within the words, but also within the spirit and intention of the statute.

This reasoning has been indulged upon a supposition that the title of the defendants has not been sufficiently recorded, which is not admitted. The decree, which is their title, is of record in the chancery suit in the proper county where the land lies, and it was recorded in the office of the recorder of deeds. Whether this last mode of recording the decree is usually practised in Ohio or not, we are not informed. But we suppose the defendants had done all they could do, to commit their title to record in the proper county.

The third instruction given by the court to the jury, which forms the second ground relied on by the plaintiff's counsel for a reversal of the judgment, cannot be sustained. Although the proposition may be true, that a material erasure or alteration in a deed after its execution may avoid the deed, yet the instruction ought not to have been given in the terms used by the court. Whether erasures and alterations had been made in the deed or not, was a question of fact proper to be referred to the jury; but whether the erasures and alterations were material or not, was a question of law which ought to have been decided by the court. The instruction given refers the question of materiality to the jury, as well as the fact of alteration and erasure.

*If the name of William Steele was inserted in the deed [*561] as grantee after its full execution and attestation, instead of the name of some other grantee which was stricken out, no doubt the alteration was very material, and nothing could in that case pass by the deed to William Steele. The two other alterations supposed

altered in a material point after it was sealed, attested, and acknowledged, such alteration absolutely avoids the deed; and it can convey no title to the lessor of the plaintiff; which instructions the court gave and the plaintiff excepted.

The counsel for the plaintiff relies on the following points for a reversal of the judgment: —

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2. That the court below erred in charging the jury that if the deed from Jesse Spencer to William Steele was altered in a material part, after it was sealed, attested, and acknowledged, such alteration absolutely avoids the deed, and it can pass no title to the lessor of the plaintiff.

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[* 560] notice. The case of the *defendants is then within the terms of the Registry Act. They obtained their decree, and paid the purchase-money directed by the decree without notice; and the decree had obtained, by operation of the statute, all the attributes of a perfect legal title.

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in the words "Ross" and "Ohio," in the description of the grantee's residence, may have been either material or immaterial, as upon a sound construction of the whole instrument they would or would not alter or change its operation and effect.

The court ought to have decided the question of materiality in each instance, leaving the fact of alteration to the jury for their decision. The instruction given was calculated to mislead the jury by impressing on them the belief that they were warranted in finding either of the supposed alterations to be material, however it may have been in point of law. The construction of deeds belongs to the province of the court, the materiality of an alteration in a deed is a question of construction, and in this case the court committed an error, by giving an instruction to the jury which imposed on them a difficult question of construction, upon which the jury ought to have been enlightened by the decision of the court.

The judgment of the circuit court must be reversed, and the cause remanded, with instructions to award a *venire facias de novo*.

WILLIAM S. NICHOLLS, and others, Appellants, *v.* THOMAS HODGES, Executor of THOMAS C. HODGES, deceased.

1 P 562.

The decision of the orphans' court for the county of Washington in the District of Columbia, as to the *quantum* of commissions to be allowed to an executor is conclusive, and no appeal lies.

THE case is stated in the opinion of the court.

Key, for the appellant.

Coxe, contrà.

[*564] *DUVALL, J., delivered the opinion of the court.

The appellee in this case obtained letters testamentary on the estate of Thomas C. Hodges, deceased, and passed accounts in the orphans' court for Washington county, in which he was allowed ten per cent. commission on the inventory of the deceased's estate, amounting to $2,358.70, and $1,200 for services rendered to the deceased in his lifetime. The appellants, creditors of the deceased, finding that the estate would probably be insufficient to pay the full amount of their claims, filed their petition in the orphans' court objecting to the allowance of the claims of the executor, alleging that the property of the deceased consisted only of a store of goods in Georgetown, and a few debts due to him, and that the settlement of the estate was made without much labor or expense. Upon the

answer of the executor, and the testimony taken in the cause, the judge of the orphans' court decided in favor of the executor, and decreed that both claims be allowed. From this decree an appeal was prayed and granted to the circuit court, for Washington county, in which the judgment of the orphans' court was affirmed. From this decision the cause is brought up by appeal to this court for final hearing and decree.

Several questions have been raised in arguing this cause. On the part of the appellants, it is contended, first, that the * allowance of ten per cent. on the inventory, circumstanced [*565] as this case appears to be, is unjust and unreasonable. Secondly, That there is no foundation for the claim of $1,200, made by the executor for services rendered the testator in his lifetime.

The counsel for the appellee contends, first, that the whole allowance made by the orphans' court was no more than a moderate compensation for the attention and prompt settlement of the accounts of the deceased, by the executor, and for his services for several years as a clerk in the store of the deceased; and secondly, that the decision of the orphans' court was final and conclusive, and from which there ought to have been no appeal.

The power and authority of the orphans' court is derived from the testamentary laws of Maryland. The last general act upon the subject is that passed in the year 1798, c. 101. The orphans' court has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the court, "not under five per cent. nor exceeding ten per cent. on the amount of the inventory." If the executor has a claim against the deceased, it shall stand on an equal footing with other claims of the same nature. On a plenary proceeding, if either party shall require, the court will direct an issue or issues to be made up and sent to a court of law to be tried, and any person conceiving himself aggrieved by any judgment, decree, decision, or order, may appeal to the court of chancery, or to a court of law. And in Maryland, the decision of the court in which the appeal is made is final and conclusive. But in the case under consideration, this court has jurisdiction by virtue of the act of congress of February, 1801,[1] by which the circuit court for the District of Columbia was created, which provides, s. 8, that "any final judgment, order, or decree, in the said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of $100, may be reëxamined, and reversed or affirmed in the supreme court of the United States, by writ of error or appeal."

[1] 2 Stats. at Large, 106.

By an act of congress[1] subsequently passed, the matter in dispute exclusive of costs must exceed the value of $1,000 in order to entitle the party to an appeal.

With respect to the commission to be allowed to the executor or administrator, it is submitted by law to the discretion of the court, not less than five nor more than ten per cent. They may allow the lowest or highest rate, or any intermediate proportion between the *minimum* and *maximum*, to which, in their discretion, [*566] they may adjudge the party to be entitled *upon a consideration of all circumstances, according to the services rendered, and the trouble and expense in completing the administration. Upon a just construction of this act, it was obviously the intention of the legislature, that the decision of the orphans' court should be final and conclusive, and such is the opinion of this court.

The claim of $1,200, for services rendered in the lifetime of the testator, rests upon different ground. The law places it "on an equal footing with other claims of the same nature." The legality and equity of the claim must be examined in the same manner as the claim of any other creditor Of course, it is a claim on the trial of which either party might have required a trial by jury in the manner prescribed by law. But this was not asked, and the claim was submitted in gross to the decision of the orphans' court, and was decided on in like manner by the circuit court; and it is now brought in the same shape before this court.

To support a claim of this nature, it is incumbent on the party making it to prove some contract, promise, or agreement, expressed or implied, in relation to it. The testimony contained in the record may be summed up in a few words. It is admitted by the appellee, that there was no agreement to pay him wages. It is in proof that he lived with his uncle three or four years in the capacity of a clerk, and that, for more than half the time, he was the only clerk in the store, his uncle having great confidence in him. That it was distinctly understood between them that the testator had agreed to pay his board, to find him in clothing, and to pay his expenses generally. That it was customary among merchants to take young men of a certain age for their board and clothes; that the uncle had said that at a future day he intended to take him into partnership with him; and it was proved that the testator, at the time of making his will, observed that he had given his nephew a legacy as a consideration for his services, and that he had always intended to give him something. It is not denied that the testator had fully complied with his engagement to pay his board, supply him with clothes, and pay his

[1] 3 Stats. at Large, 261.

expenses. On this testimony the claim rests. The evidence is too defective to require comment. It is the opinion of this court that it is too loose and indeterminate to sanction the claim, and it cannot be allowed.

The decree of the circuit court, affirming the decree of the orphans' court as to this is reversed, in all other respects it is affirmed.

8 H. 402.

The Bank of Columbia *v.* George Sweeny.

1 P. 567.

This court will not grant a *mandamus* to revise the proceedings of a circuit court as to the pleadings. This can only be done by a writ of error after a final judgment.

Messrs. *Jones* and *Key* moved the court for a *mandamus*.

The case is stated in the opinion of the court.

* *Jones* and *Key*, for the plaintiffs. [* 569]

Swann and the *Attorney-General*, for the defendant.

Marshall, C. J., delivered the opinion of the court.

This case arose under the provision of the act of the legislature of Maryland, incorporating the Bank of Columbia, which authorizes summary process for the collection of debts due to the bank. That act allows an execution against the person of the debtor to issue, in the first instance, upon the application of the president of the bank; but it also authorizes the court, if upon the return of the execution the defendant "dispute the debt," to order an issue to be made up, &c., to try the action.

In the present case, the circuit court did not refuse to direct such an issue to be made up; which, had they refused to do, a *mandamus* would have been the proper process to compel that to be done which the act requires. But the circuit court did direct an issue, and allow a plea of the statute of limitations.

The application now is that the circuit court be ordered to withdraw that issue, and to direct a different issue to be made up according to what the counsel for the bank supposes to be the proper construction of the act.

We think this is not a proper case for a *mandamus*. It does not differ in principle from any other case in which the party should plead a defective plea, and the plaintiff should demur to it; in which case there is no doubt that the revising power of this court could be exercised only by a writ of error.

If this motion could now prevail, it would be a plain evasion of

the provision of the act of congress,[1] that final judgments only should be brought before this court for reëxamination. This case might still be brought before this court by a writ of error, notwithstanding any opinion expressed upon the *mandamus*, and the same question again be discussed upon the final judgment. The effect, therefore, of this mode of interposition would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this court many times before there would be a final judgment.

The court is therefore of opinion that this is not a case for a *mandamus*, and the motion is denied.

STEPHEN WARING, Plaintiff in Error, *v.* JAMES JACKSON, Ex-devise of MEDCEF EDEN and another, Defendants in Error. THE SAME *v.* THE SAME.

1 P. 570.

Under a devise to two sons in fee, with a clause that if either die without issue, the survivor should take his part, and if both die without issue, then over. *Held*, that, under the law of New York, nothing passed by this last limitation over.

A possession of land taken and held under an execution, not against the lawful owner, does not prevent him from devising the land under the law of New York.

THOMPSON, J., delivered the opinion of the court.

These cases come up from the circuit court of the United States for the southern district of New York, upon writs of error. The question in the court below turned upon the construction of the will of Medcef Eden, the elder, bearing date the 29th August, 1798, by which the testator devised to his son, Joseph, certain portions of his estate, among which were the premises in question in this cause. "To him, his heirs, executors, and administrators forever." In like manner, he devised to his son, Medcef, his heirs and assigns, certain other portions of his property, and adds the following clause: "Item. It is my will, and I do order and appoint that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor. And in case of both their deaths without lawful issue, then I give all the property aforesaid to my brother, John Eden, of Lofters, in Cleveland, in Yorkshire, and my sister, Hannah Johnson, of Whitby, in Yorkshire, and their heirs."

[*571] *The case of Jackson *v.* Chew, 12 W. 153, decided at the last term, brought under the consideration of this court the construction of this same clause in the will, and the records in the present cases have been submitted to the court, without argument, to

[1] 1 Stats. at Large, 85.

see whether the decision in that case will govern the cases now before us. The facts disclosed in the case of Jackson *v.* Chew, did not require of the court to decide any other question than whether Joseph Eden took under the will an estate tail, which, by operation of the statute of New York, abolishing entails, would be converted into a fee-simple absolute. The court decided that he did not take an estate tail, but an estate in fee, defeasible in the event of his dying without issue in the lifetime of his brother, (which event happened,) and thereupon his interest in the land became extinct, and the limitation over to his brother, Medcef, was good as an executory devise.

In the cases now before the court, it appears that Medcef Eden has died without issue, having by his last will and testament devised his estate to his widow, and certain other devisees therein named, which has given rise to two other questions, namely, whether John Eden and the heirs of Hannah Johnson (she being dead) took any estate in the premises, under this clause in the will, on the death of Medcef Eden, without issue?

And whether the possession taken and held under the sheriff's sale, by virtue of the judgments and executions against Joseph Eden was such an adverse holding as to prevent the operation of the will of Medcef Eden, the younger.

In deciding the case of Jackson *v.* Chew, we did not enter into an examination of the construction of this clause in the will, considered as an open question; but adopted the construction, which appears to be well settled in the two highest courts of law in the State of New York, not only upon this very clause, but in numerous other analogous cases; and has thereby become a fixed rule of landed property in that State.

And this was in conformity with what has been the uniform course of this court with respect to the titles to real property to apply the same rule that we find applied by the state tribunals in like cases.

The additional questions presented in the cases now before us, have likewise undergone a very full examination in that State, and been decided both by the supreme court and the court for the correction of errors. In the case of Wilkes *v.* Lion, 2 Cowen, 333, the decision turned upon these very points, and the court of errors affirming the decision of the supreme court, held with only one dissenting voice, that nothing passed under the ulterior devise over to John Eden and Hannah Johnson, but that Medcef Eden had become seised of an estate in fee-simple *absolute. [* 572] No opinion appears to have been directly expressed by the court with respect to the effects of the adverse possession upon the operation of the devise in the will of Medcef Eden, the younger.

But this was a question necessarily involved in the result. And the decisions of the courts in that State are very satisfactory to show that such an adverse possession will not there prevent the operation of a devise.

The doctrine in the case of Doe *v.* Thompson, 5 Cowen, 374, warrants this conclusion. And it is understood that this precise question, arising on the construction of the statute of the wills in that State, has recently been decided in the supreme court in a case, the report of which is not to be found here.

We are accordingly of opinion that the judgments of the circuit court in these cases must be affirmed.

3 P. 99.

THE UNITED STATES, Plaintiffs in Error, *v.* NICHOLAS STANSBURY AND EDWARD MORGAN.

1 P. 573.

A discharge, by the secretary of the treasury, of the principal debtor taken on a *ca. sa.* pursuant to the act of June 6, 1798, (1 Stats. at Large, 561,) does not release his sureties from the judgment, nor operate as a satisfaction thereof.

ERROR to the circuit court of the United States for the district of Maryland. The case is stated in the opinion of the court.

Wirt, (attorney-general,) for the United States. No counsel *contrà*.

[*574] * MARSHALL, C. J., delivered the opinion of the court.

This was an action of debt on a judgment which had been rendered in favor of the United States, against Thomas Sheppard, and the two defendants in error. The marshal returned, as to Sheppard, *non est inventus*. The other two defendants pleaded that they were sureties to Sheppard, in the bond on which the [*575] former judgment was rendered; that the United * States took out a *ca. sa.* on that judgment against Sheppard, by virtue of which he was imprisoned; whereupon William H. Crawford, the secretary of the treasury of the United States, released the said Sheppard from execution on his paying costs, and conveying all his property, real, personal, and mixed, to the United States, with which condition, it is admitted, Sheppard complied. The United States demurred, and the circuit court gave judgment on the demurrer, *pro forma*, for the defendants, which judgment is now before this court on a writ of error.

It is not denied that, at common law, the release of a debtor whose person is in execution, is a release of the judgment itself. Yet the body is not satisfaction in reality, but is held as the surest

means of coercing satisfaction. The law will not permit a man to proceed at the same time against the person and estate of his debtor; and when the creditor has elected to take the person, it presumes satisfaction if the person be voluntarily released. The release of the judgment is, therefore, the legal consequence of the voluntary discharge of the person by the creditor.

This being the positive operation of the common law, it may unquestionably be changed by statute.

The United States contend that it is changed, by the act providing for the relief of persons imprisoned for debts due to the United States. That act authorizes the secretary of the treasury, on receiving a conveyance of the estate of a debtor confined in jail at the suit of the United States, or any collateral security to the use of the United States, to discharge such debtor from his imprisonment under such execution; and he shall not be again imprisoned for the said debt; "but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then or at any time afterwards belong to the debtor.

The sole duty of the court is to construe this statute according to its words, and the intent of the legislature. Did congress design to discharge the sureties or to release the judgment?

The act is "for the relief of persons imprisoned for debts due to the United States," not for the relief of their sureties; and does not contain a single expression conducing to the opinion that the mind of the legislature was directed towards the sureties or contemplated their discharge. The only motive for the act being to relieve debtors, who surrender all their property, from the then useless punishment of imprisonment, there can be no motive for converting this act of mere humanity into the discharge of other debtors, whose condition it does not in any manner deteriorate. If the act produces this * effect, it is an effect contrary to its intention, [* 576] occasioned by a technical rule originating in remote ages, which has never been applied to a statutory discharge of the person.

But the language of the statute has guarded against this result. It has expressly declared that the judgment shall remain good and sufficient in law. How can this court say that it is not good, and is not sufficient? If it be good and sufficient, for what purpose is it so? Certainly, for the purposes for which it was rendered; to enable the United States to proceed regularly upon it, as upon other judgments, with the single exception made by the act itself. The voluntary discharge of a debtor by his creditor is a release of the judgment, because such is the law. But in this case the legislature has altered the law. It has declared that the discharge of a debtor

in the forms prescribed, shall amount solely to a liberation of the person, not to a release of the judgment; that shall remain good and sufficient. Were courts to say that, notwithstanding this provision, the judgment is released, it would amount to a declaration, that a technicalrule in the common law, founded in a presumption growing out of the simplicity of ancient times, and not always consistent with the fact, is paramount to the legislative power. It would in fact be to repeal the statute. It would unquestionably be to defeat the object of the legislature; since it would be no very hardy assertion to say that, if the discharge of the person in custody discharged the other obligors, the imprisoned debtor would never be released while the debt remained unpaid; unless the insolvency extended to all the obligors.

The second point made by the counsel for the defendants, that the sureties are exonerated by the compromise made with the principal without their concurrence, is the same in principle with that which has been considered. No compromise of the debt has been made. The course prescribed by the law has been pursued. The whole property of the imprisoned debtor has been surrendered, and on receiving it his person has been discharged. The act of congress declares that the judgment shall still remain in force. If the creditor had entered into a compromise not prescribed by law, or had given any discharge not directed by statute, the question might have been open for argument. But, while the whole transaction is within the precise limits marked out by law, it cannot produce a result directly opposite to that intended by the statute. The only doubt which can be suggested, respecting the intent of the legislature, is created by the last words of the sentence, declaring that the judgment shall remain good and sufficient in law. They are, "and may be satisfied out of any estate which may then, or at any time afterwards belong to the debtor. These words are [*577] certainly *useless; and may be supposed to indicate an idea that it could be satisfied out of the estate of the debtor only; that, as they are not required to render that estate liable, they may be understood to limit the right of the creditor to obtain satisfaction from the estate of any other person. We do not, however, think this the correct construction. The words are considered as mere surplusage, not as limiting the rights of the United States to proceed against all those who are bound by the judgment.

We think, then, that the circuit court ought to have sustained the demurrer; and that the judgment which overrules it ought to be reversed. But considering the plea, and the manner in which the

cause has been brought up, the court will not direct an absolute judgment to be entered for the United States; but will reverse the judgment and remand the same for further proceedings, that the circuit court may give leave to the defendants to plead.

5 P. 173; 15 H. 261.

THE BANK OF COLUMBIA, USE OF THE BANK OF THE UNITED STATES *v.* JOHN LAWRENCE.

1 P. 578.

An indorser resided in the country, two or three miles from the town of Georgetown, where the note was payable, and was in the habit of receiving his letters at the post-office of that place; held, that a notice put into that post-office, and directed to him at Georgetown, was sufficient.

THE case is stated in the opinion of the court.

Key and *Dunlop*, for the plaintiffs.

Jones and *Taylor*, contrà.

* THOMPSON, J., delivered the opinion of the court. [* 580]

This case comes before the court upon a writ of error to the circuit court of the District of Columbia.

* The defendant was sued as indorser of a promissory [* 581] note for $5,000, made by Joseph Mulligan, bearing date the 15th of July, 1819, and payable sixty days after date, at the Bank of Columbia. The making and indorsing the note, and the demand of payment, were duly proved; and the only question upon the trial was touching the manner in which notice of non-payment was given to the indorser; no objection being made to the sufficiency of the notice in point of time.

The material facts before the court upon this part of the case, as shown by the bill of exceptions, were: That the banking-house of the plaintiffs was in Georgetown, at which place the note appears to be dated. That some time before the note fell due the defendant had lived in the city of Washington, and carried on the business of a morocco leather-dresser, keeping a shop and living in a house of his own in the said city. That about the year 1818, he sold his shop and stock in trade and relinquished his business, and removed with his family to a farm, in Alexandria county, within the District of Columbia, and about two or three miles from Georgetown. That the Georgetown post-office was the nearest post-office to his place of residence, and the one at which he usually received his letters.

The notice of non-payment was put into the post-office, at Georgetown, addressed to the defendant at that place. It was proved on the part of the defendant, that at the time of his removal into the country, and from that time until after the note in question fell due, he continued to be the owner of the house in Washington, where he formerly lived, and which was occupied by his sister-in-law, Mrs. Harbaugh. That he came frequently and regularly every week, and as often as two or three times a week, to this house; where he was employed in winding up his former business and settling his accounts, and where he kept his books of account, and where his bank notices, such as were usually served by the runner of the bank on parties who were to pay notes, were sometimes left, and sometimes at a shop opposite to his house; and where also his newspapers and foreign letters were left. That his coming to town and so employing himself was generally known to persons having business with him. That his residence in the country was known to the cashier of the bank. That there was a regular daily mail from Georgetown to the city of Washington, and that the defendant's house was situated in Washington less than a quarter of a mile from Georgetown.

There was also some evidence given on the part of the plaintiffs tending to show that the usage of the bank in serving notices in similar cases, was conformably to the one here pursued, and [*582] that the defendant was apprised of such usage. But * that testimony may be laid out of view, as this court does not found its opinion in any measure upon that part of the case. Upon this evidence the plaintiffs prayed the court to instruct the jury, that it was not incumbent on them to have left the notice of the non-payment of the note at the house occupied by Mrs. Harbaugh, as stated in the evidence; but that it was sufficient, under the circumstances stated, to leave the notice at the post-office in Georgetown; which instructions the court refused to give, but instructed the jury that their verdict must be governed according to their opinion and finding on the subject of usage which had been given in evidence.

The jury found a verdict for the defendant.

From this statement of the case it appears that the note was made at Georgetown, payable at the Bank of Columbia, in that town. That the defendant when he indorsed the note lived in the county of Alexandria, within the District of Columbia, and having what is alleged to have been a place of business in the city of Washington; and the notice of non-payment was put into the Georgetown post-office, addressed to the defendant at that place, by which it is understood that the notice was either inclosed in a letter, or the notice itself sealed and superscribed with the name of the defendant, with

the direction "Georgetown" upon it; and whether this notice is sufficient is the question to be decided.

If it should be admitted that the defendant had what is usually called a place of business in the city of Washington, and that notice served there would have been good; it by no means follows that service at his place of residence in a different place, would not be equally good. Parties may be and frequently are so situated that notice may well be given at either of several places. But the evidence does not show that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business of any kind carried on, but merely occasional employment there two or three times a week in a house occupied by another person; and the defendant only engaged in settling up his old business. In this view of the case, the inquiry is narrowed down to the single point, whether notice through the post-office at Georgetown was good; the defendant residing in the country two or three miles distant from that place in the county of Alexandria.

The general rule is, that the party whose duty it is to give notice in such cases is bound to use due diligence in communicating such notice. But it is not required of him to see that the notice is brought home to the party. He may employ the * usual [*583] and ordinary mode of conveyance, and, whether the notice reaches the party or not, the holder has done all that the law requires of him.

It seems at this day to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. This is certainly best calculated to have fixed on uniform rules on the subject, and is highly important for the safety of holders of commercial paper.

And these rules ought to be reasonable and founded in general convenience, and with a view to clog as little as possible, consistently with the safety of parties, the circulation of paper of this description; and the rules which have been settled on this subject have had in view these objects. Thus, when a party entitled to notice, has in the same city or town a dwelling-house and counting-house or place of business within the compact part of such city or town, a notice delivered at either place is sufficient; and if his dwelling and place of business be within the district of a letter-carrier, a letter containing such notice, addressed to the party and left at the post-office, would also be sufficient. All these are usual and ordinary modes of communication, and such as afford reasonable ground for

presuming that the notice will be brought home to the party without unreasonable delay. So when the holder and indorser live in different post-towns, notice sent by the mail is sufficient, whether it reaches the indorser or not. And this for the same reason, that the mail being a usual channel of communication, notice sent by it is evidence of due diligence. And for the sake of general convenience it has been found necessary to enlarge this rule. And it is accordingly held, that when the party to be affected by the notice resides in a different place from the holder, the notice may be sent by the mail to the post-office nearest to the party entitled to such notice. It has not been thought advisable, nor is it believed that it would comport with practical convenience, to fix any precise distance from the post-office within which the party must reside, in order to make this a good service of the notice. Nor would we be understood as laying it down as a universal rule, that the notice must be sent to the post-office nearest to the residence of the party to whom it is addressed. If he was in the habit of receiving his letters through a more distant post-office, and that circumstance was known to the holder or party giving the notice, that might be the more proper channel of communication, because he would be most likely to receive it in that way; and it would be the ordinary mode of communicating information to him, and therefore evidence of due diligence.

In cases of this description, where notice is sent by mail [*584] to a party living in the country, it is distance alone or *the usual course of receiving letters which must determine the sufficiency of the notice. The residence of the defendant, therefore, being in the county of Alexandria, cannot affect the question. It was in proof that the post-office in Georgetown was the one nearest his residence, and only two or three miles distant, and through which he usually received his letters. The letter containing the notice, it is true, was directed to him at Georgetown. But there is nothing showing that this occasioned any mistake or misapprehension with respect to the person intended, or any delay in receiving the notice. And as the letter was there to be delivered to the defendant, and not to be forwarded to any other post-office, the address was unimportant, and could mislead no one.

No cases have fallen under the notice of the court which have suggested any limits to the distance from the post-office within which a party must reside in order to make the service of the notice in this manner good. Cases, however, have occurred, where the distance was much greater than in the one now before the court, and the notice held sufficient. 16 Johns. 218. In cases where the party entitled to notice resides in the country, unless notice sent by mail is suffi-

cient, a special messenger must be employed for the purpose of serving it. And we think that the present case is clearly one which does not impose upon the plaintiffs such duty. We do not mean to say no such cases can arise, but they will seldom if ever occur, and, at all events, such a course ought not to be required of a holder, except under very special circumstances. Some countenance has lately been given to this practice in England in extraordinary cases, by allowing the holder to recover of the indorser the expenses of serving notice by a special messenger. The case of Pearson *v.* Crallan, 2 Smith, 404, Chitty, 222, n., is one of this description. But in that case, the court did not say that it was necessary to send a special messenger; and it was left to the jury to decide whether it was done wantonly or not. The holder is not bound to use the mail for the purpose of sending notice. He may employ a special messenger if he pleases, but no case has been found where the English courts have directly decided that he must. To compel the holder to incur such expense would be unreasonable, and the policy of adopting a rule that will throw such an increased charge upon commercial paper on the party bound to pay, is at least very questionable.

We are accordingly of opinion that the notice of non-payment was duly served upon the defendant, and that the court erred in refusing so to instruct the jury.

Judgment reversed, and a *venire facias de novo* awarded.

2 P. 543; 9 P. 33; 10 P. 572; 2 H. 457; 4 H. 185, 262, 336; 18 H. 517.

JOHN ARCHER AND JOHN W. STUMP, Executors of JOHN STUMP, Complainants and Appellants, *v.* MARY DENEALE, Widow and Executrix of GEORGE DENEALE, deceased, CHARLES T. STUART AND ANN LUCRETIA, his wife, MARY CATHARINE AND NANCY P. DENEALE, Children and Representatives of the said GEORGE DENEALE, Defendants and Appellees.

1 P. 585.

Though a will charging debts on the testator's "estate" may subject his lands to their payment, yet if the context shows the testator referred only to his personalty by the word estate, the lands are not charged.

THE case is stated in the opinion of the court.

Swann, for the appellants.

Lee, contrà.

* MARSHALL, C. J., delivered the opinion of the court. [*588]

This suit was brought in the circuit court for the District

of Columbia, sitting in the county of Alexandria, to subject the lands of George Deneale to the payment of a debt for which he was surety. The sole question arises on the construction of his will. The complainants contend that it charges his lands with his debts.

By his will, the testator gives to his wife "all his estate real and personal during her life, for the use and purpose of raising and educating his children until they respectively are twenty-one." He directs that each child shall, at that age, become entitled to an equal portion of his estate, both real and personal, "subject each to a deduction of one third of the same," to be retained for the support and maintenance of his wife. He recommends to his wife to sell the negroes for a term of years. He directs that an appraisement
[* 589] only of his * estate "shall be made; that no sale of furniture shall take place." He then states that he is indebted to no one, and purposes to continue so. He states that he is surety for his brother James for two sums, for which he has a deed of trust on his property, sufficient, he hopes, to pay the same. He then directs that his estate shall not be sold to pay these debts until the property so deeded shall be sold, when his estate must be charged with any deficiency. He directs that his executor and executrix should not give security, as his own debts did not require it.

That the word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts if used with other words which indicate an intention to charge them, is a proposition which cannot be controverted. As little is it to be denied that the word alone, if not used with an intent to subject the lands of the testator to the payment of his debts, cannot have that effect.

In the will under consideration the testator alludes in two instances to his property generally; in both, he uses the words "estate," both "real and personal." In the next instance the word estate is introduced alone in the clause which follows: "Item, I do hereby direct that an appraisement only of my estate be made, and that no sale of furniture shall take place."

In Virginia, lands are never appraised, and the law directs a sale of all perishable articles. When, therefore, the testator directs that an appraisement only of his estate be made, and that no sale of furniture shall take place, he obviously applies the term exclusively to that kind of property, the appraisement of which is directed by law, and is usual; and by adding the word "only," restrains his executors from selling that property which is directed by law to be sold. In this clause, the word estate is plainly confined to personalty. He then speaks of the debts for which he is surety for his brother James, and directs that his "estate" shall not be sold to pay these debts

until the property conveyed to him in trust shall be exhausted. This direction is obviously restrictive. It restrains the executors from using a power they possess under the law. That power is to sell the personal estate for the payment of debts, but it does not extend to the sale of lands; consequently, the word estate in this place also designates only personal estate. After this prohibition to sell his estate until the trust property should be all applied to the object, he adds, "when my estate must be charged with any deficiency."

There is no foundation for the opinion that the testator has used the word estate in this part of the sentence in a different sense from that in which it was used in the same * sentence [* 590] immediately before, while treating of the same subject. The same estate, the sale of which he had just forbidden until a particular event should take place, must, he says, be sold when that event shall take place. He means only his personal estate.

It would, we think, be an entire perversion of the language used by the testator, to construe these words a charge upon his estate. He does not intend to create any liability which the law had not created. When the trust property shall be exhausted, his estate, he says, "must be charged with the deficiency." He can no longer prevent its sale.

We think there is no error in the decree, which declares that the will of George Deneale does not charge his real estate with his debts, and that the bill of the complainants be dismissed with costs, and that the said decree be affirmed.

JOHN TAYLOE, Plaintiff in Error, *v.* ELISHA RIGGS, Defendant in Error.

1 P. 591.

The affidavit of a party is competent evidence of the loss of a paper; it is not conclusive, but it is to be weighed by the court in connection with the circumstances.

When the contents of a written contract are to be proved by parol, vague or uncertain recollections are not sufficient; the substance of the agreement must be satisfactorily proved.

THE case is stated in the opinion of the court.

Lee and *Jones*, for the plaintiff.

Swann and *Key*, contrà.

* MARSHALL, C. J., delivered the opinion of the court. [* 594] This action was brought in the circuit court for the Dis-

trict of Columbia, by Elisha Riggs, the defendant in error, to recover back a sum of money paid on a contract for the purchase of stock.

The declaration contained two counts; the first on the contract, which was in writing; the second for money had and received by the defendant, to the use of the plaintiff.

At the trial, the plaintiff in the circuit court offered testimony to prove the contents of the contract, having first given notice to the defendant to produce the duplicate copy, which had been delivered to him when it was executed, and made an affidavit that the copy which had been retained by him, was either destroyed or lost.

The secondary evidence was admitted, the defendant in the circuit court reserving all objections, both to its admissibility and competency.

The first count in the declaration states a conversation between the parties, on the 15th of May, 1818, concerning the sale of the stock which the said John Tayloe held in the Central Bank of Georgetown; and alleges that it was then and there agreed that the said John should sell to the said Elisha the stock which he held in the said bank, amounting to 7,642 shares at par; and, further, that the said John represented that a dividend of four per cent. would be made on the said stock, at the ensuing first Monday in July, and insisted that the said Elisha should advance to him, in addition to the par value, so much of the said dividend as the said stock had already earned, which, according to a calculation then made, [*595] *amounted to three per cent. The declaration further alleges that the said Elisha, confiding in the representations of the said John, did agree to advance the supposed earnings of the said stock. The agreement was then reduced to writing, and signed by the parties. It was further agreed that the said Elisha might confirm or annul the contract in days. The declaration further states that, confiding entirely to the representations of the said John, the said Elisha did agree to confirm the said agreement, and did agree to buy the said stock, at par price, and to advance to the defendant the profits which the stock was supposed to have earned.

The declaration then charges that the stock was transferred, its par value paid, and the additional sum of three per cent., its supposed earnings, amounting to $1,902, paid. The declaration further charges that, at the time of the contract, the bank had made no profit on which a dividend could be declared; and that it was not competent for the said bank, on the said first Monday in July, then next following, to declare any dividend; and that in fact the bank did not declare any dividend on the said stock, of which the said defendant had notice, by means whereof he became liable and bound to refund

the money so advanced for the supposed earnings of the said stock, and, being so liable, he in consideration thereof assumed, &c.

William Hebb, a witness produced by the plaintiff below, deposed that he came into a room in which the parties were sitting, when the said Tayloe informed him that the said Riggs was about to purchase his stock; and he requested the witness to take a seat and be an evidence to the contract. The said Riggs then asked the said Tayloe what were his terms? He answered that he would take par, with the dividend which would be declared at the next periodical term, which he thought would be four per cent. Mr. Riggs said, he supposed Mr. Tayloe meant only the interest which had accrued at that time, to which Mr. Tayloe assented; a calculation was then made, and the supposed profit estimated at three per cent. The plaintiff asked time to consult his friends, and said he would take the stock on the terms offered. The plaintiff, at the request of the defendant, drew up a memorandum of the agreement, which was read over hastily in the presence and hearing of the witness. It was copied, signed, and attested by the witness, and each party took one.

He understood, a day or two afterwards, that the contract was affirmed. On being cross-examined, the witness said that he did not recollect whether the written contract expressed that par was to be paid for the stock, nor that any advance upon the stock was specified; nor does he recollect how the contract *was ex- [*596] pressed. But his impression and belief is, that the understanding of the parties was, that three per cent. was to be paid upon a contingency that the next dividend amounted to four per cent., and that the written contract was to the same effect.

The counsel for the defendant below objected both to the admissibility and competency of this testimony; but the court overruled his objections, and permitted it to go to the jury. To this opinion he excepted.

The first question to be considered is, whether parol testimony could, in this case, be let in to prove the written contract.

The rule of law is, that the best evidence must be given of which the nature of the thing is capable; that is, that no evidence shall be received which presupposes greater evidence behind, in the party's possession or power. The withholding of that better evidence raises a presumption that, if produced, it might not operate in his favor. For this reason a party, who is in possession of an original paper, or who has it in his power, is not permitted to give a copy in evidence, or to prove its contents.

When, therefore, the plaintiff below offered to prove the contents of the written contract, on which this suit was instituted, the defend-

ant might very properly require the contract itself. It was itself superior evidence of its contents to any thing depending on the memory of a witness. It was once in his possession, and the presumption was that it was still so. It was necessary to do away this presumption, or the secondary evidence must be excluded. How is it to be done away? If the loss or destruction of the paper can be proved by a disinterested witness, the difficulty is at once removed. But papers of this description generally remain in possession of the party himself, and their loss can be known in most instances only to himself. If his own affidavit cannot be received, the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, would amount to a complete loss of his rights, at least in a court of law. The objection to receiving the affidavit of the party is, that no man can be a witness in his own cause. This is undoubtedly a sound rule, which ought never to be violated. But many collateral questions arise in the progress of a cause, to which the rule does not apply. Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, which facilitate the preparation for it, often depend on the oath of the party. An affidavit to the materiality of a witness, for the purpose of obtaining a continuance, or a commission to take
[* 597] his deposition, or an affidavit of his inability to attend, * is usually made by the party, and received without objection. So, affidavits to support a motion for a new trial are often received. These cases, and others of the same character which might be adduced, show that on many incidental questions which are addressed to the court, and do not affect the issue to be tried by the jury, the affidavit of the party is received.

The testimony which establishes the loss of a paper is addressed to the court, and does not relate to the contents of the paper. It is a fact which may be important as letting the party in to prove the justice of the cause, but does not itself prove any thing in the cause. As this fact is generally known only to the party himself, there would seem to be a necessity for receiving his affidavit in support of it.

In the courts of common law of England, we find some cases in which the affidavit of a party has been received respecting collateral facts which occur in the progress of a cause; and in courts of equity it is usual, when a bill is filed to set up a written instrument which is lost, to annex an affidavit to the bill that the instrument is lost. In Forbes *v.* Wale, 1 Sir W. Black. R. 532, the plaintiff offered a bond in evidence, attested by two witnesses, on proving the death of one of them; but being himself examined, acknowledged the other to be living. He was nonsuited. It cannot be doubted that had he sworn the

other subscribing witness was dead, he would have been allowed to prove the bond. In Morrow *v.* Sanders, 3 Moore, 671, the plaintiff was permitted to have access to a paper in the possession of the opposite party, on his own affidavit that there was no copy or counterpart in his possession, nor had there ever been one between the parties except that in possession of the defendant. In Jackson *v.* Frier, 16 Johns. 193, the supreme court of New York indicated the opinion that secondary evidence might be admitted to prove the contents of a paper on the affidavit of the party to its loss. Mr. Chief Justice Spencer, in delivering the opinion of the court, quoted Godbolt, 193, in which the court refused to permit the depositions of witnesses taken in a suit between the same parties to be read, unless affidavit be made that the witnesses were dead; and also, Godbolt, 326, in which the court said that if the party cannot find a witness, he is as it were dead unto him; and his deposition in an English court, in a cause between the same parties, may be allowed to be read to the jury, so as the party make oath that he did his endeavor to find the witness, but that he could not.

In the former decisions in this cause, 9 W. 483, this question was, we think, substantially, though not expressly determined.

When we compare the mischief to be apprehended from the *admission of secondary proof, on the affidavit of the [*598] party, where there is reason to believe that other testimony to that fact cannot be adduced with the mischief to arise from the absolute exclusion of such an affidavit, we think the views of justice will be best promoted by allowing the affidavit, not as conclusive evidence, but as submitted to the consideration of the court, to be weighed with the other circumstances of the case. In the case before the court, it is not probable that any other testimony of the loss of the paper was attainable; and we think the affidavit of the party laid a proper foundation for the admission of secondary evidence. Secondary evidence having been properly admitted, and the transfer of the stock and the payment of the purchase-money proved, the next inquiry is into its competency, to establish the contract stated in the declaration.

This not being an action for deceit and imposition, but on a written contract, the right of the plaintiff to recover is measured precisely by that contract, and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view in construing the instrument itself. Had the written paper been produced, neither party could have been

permitted to show his inducements to make it, or to substitute his understanding of it for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this.

Discarding the representation made by the vendor of the profits of his stock, we are to inquire what was the actual agreement. The declaration states a parol agreement to sell and purchase the stock at par. But this agreement appears not to have been definitive, since a sale of the stock would pass it in its then condition, comprehending the dividends to be thereafter declared upon it. The parties therefore proceed to a consideration of that part of the subject which respects the profits; and, after concurring in the opinion that the stock was worth par, independent of the next ensuing dividend, which they supposed would be four per cent., calculate how much of this sum was already earned. They found that three per cent. was the proportion of this estimated profit, which had accrued at the date of the sale. The whole contract, thus completed, was reduced to writing and signed by the parties. It is a contract to sell all the bank stock of the vendor, rating the stock itself at par, and the dividends which had already accrued thereon, at three per cent. No stipulation was made to return this sum of three per cent. or a part of it, [*599] if no dividend or a less dividend than four per *cent. should be declared; nor to add to the sum, if a larger dividend should be declared than was estimated by the parties.

Does the testimony offered by the plaintiff in the circuit court prove this contract?

A conversation was in its progress between the parties respecting the sale and purchase of the stock, when the witness came into the room, and was requested to notice their agreement. Mr. Riggs then asked Mr. Tayloe what were his terms? Mr. Tayloe answered that he would take par, with the dividends which would be declared at the next periodical term, which he supposed would be four per cent. Four per cent. was assumed as the dividend which would be declared, and three per cent. was estimated as the portion of that dividend which had already accrued. This proposition was accepted, and the agreement reduced to writing.

If the declaration counts on one entire contract for the sale of the stock, including the dividend upon an estimate of the stock at par, and the approaching dividend at four per cent., the testimony supports it; if the declaration counts on two distinct contracts, entirely independent of each other, this part of the testimony does not support it. The witness describes a single contract consisting, it is true, of two distinct items, but both are comprehended in the same agreement.

On being cross-examined, the witness shows a very imperfect recollection of the contract he is endeavoring to describe. He does not recollect that par was to be paid, nor that any advance on the stock was specified in the contract. But his impression and belief is that three per cent. was to be paid, upon a contingency that the next dividend amounted to four per cent., and that the written contract was to the same effect.

This part of the testimony shows that what the witness had previously said, was founded on his recollection of the conversation between the parties which formed the verbal agreement, not on his recollection of the writing itself. He does not remember the terms in which the written contract was expressed, nor that par was to be paid for the stock; nor that any advance was specified. He believes that the written contract conformed to the verbal agreement, and on this belief is founded his impression that the three per cent. was to be paid on a contingency that the next dividend should amount to four per cent. Yet, when we refer to his description of the conversation which constituted the verbal agreement, no part of the consideration money is stipulated to be paid on a contingency.

The declaration does not state a contingent contract; nor is any inference to be drawn that it was contingent, from any part of the declaration, unless it be from the use of the word "advance," *which word, or any other equivalent to it, the wit- [*600] ness does not remember.

When a written contract is to be proved, not by itself but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon uncertain and vague impressions, made by a conversation antecedent to the reduction of the agreement.

A part of the testimony came out on the cross-examination, which serves to show on what uncertain ground the belief of the witness was founded, that the three per cent. depended on the contingency, that the next dividend should amount to four per cent. He was asked whether the writing was, as deposed by another witness, in these terms, or in terms to this effect: "I bind myself to receive, at any time within three days, three per cent. advance upon my stock

in the Central Bank of Georgetown and Washington." He answered, that the writing, as recollected by him, was the reverse of the terms above propounded, inasmuch as the writing described by him, bound the defendant to transfer the stock. This answer would indicate that the written contract bound the vendor to transfer his stock, at any time within three days, at three per cent. advance.

Upon the most attentive comparison we can make of the testimony given by Hebb, with the contract stated in the declaration, we think that his evidence does not support the contract as laid, and was therefore not competent to sustain the first count.

The second count, for money had and received, is not supported by any express promise to refund the money supposed to be advanced on account of the dividend, if less than four per cent. should be declared, or if no dividend should be made. It rests on the promise which the law implies, where the consideration totally fails. If the written contract comprehended the dividend, with the stock itself, so that an advance of three per cent. was given for the whole, the circumstance that this entire agreement was founded on a calculation of the separate value of the distinct parts which were the subject of it, would not entitle the purchaser to recover upon this count, because the consideration would not totally fail. Could the contract for the dividends be considered as entirely distinct
[* 601] from * that for the stock itself? The court is not prepared to say that a mere speculative bargain, where the parties know that they are treating for a thing of uncertain value, which depends on unknown contingencies, and may greatly exceed their estimate, or may be nothing; where the purchaser knows that he buys a chance, as a lottery ticket, is a bargain on which the law will raise a promise to refund the purchase-money, if the consideration should fail. It is, therefore, the opinion of the court that the testimony does not show a contract which supports the second count.

The defendant in the circuit court then gave evidence to the jury, tending to prove that the contract was a mere purchase of stock, at an advance of three per cent., and then moved the court to instruct the jury, "that the evidence given by the plaintiff, either taken by itself or in connection with that of the defendant, is not competent and sufficient to be left to the jury as evidence that the said written contract continued to be executory after the transfer of the stock by the defendant to the plaintiff, and the payment therefor by the plaintiff, as stated by the plaintiff's evidence, nor that it contained

any stipulation or condition that the three per cent. advance on the said stock was paid or agreed to be paid by the plaintiff, on a contingency that the next dividend amounted to four per cent.; or that the defendant should refund to the plaintiff the three per cent. advance upon the par value of the stock paid by the plaintiff, as aforesaid, in the event of there being no dividend declared upon such stock, at the then next ensuing regular period for declaring such dividend. The court refused to give this instruction, as prayed, being of opinion that so much of the said contract as relates to the advance of the three per cent. portion of the dividend, is executory, in so far as regarded the implied *assumpsit* of the defendant to refund the said three per cent. advance, in the event of their being no dividend on the said dividend day."

It is probable that the circuit court might not have intended to express an opinion respecting the effect of the testimony laid before the jury, but we think such an opinion is expressed. The court declares that so much of the said contract as relates to the advance of the three per cent. portion of the dividend is executory, in so far as it regarded the implied *assumpsit* of the defendant to refund, &c.

These words, we think, determine that the testimony established this implied *assumpsit*. On the question whether such a contract was proved as did raise this *assumpsit*, there was undoubtedly much conflicting testimony, and the court erred, as we think, in declaring that opinion to the jury.

After several proceedings in court, which it is unnecessary
* to mention, as they do not materially affect the merits of [* 602]
the cause, the plaintiff prayed the court to instruct the jury,
that if, from the whole evidence, the jury should be of opinion that the defendant, in his written contract, did agree to sell his stock at par, and to take the earnings which the said stock had made in lieu of the dividend, which he stated and represented would be declared at the next dividend day; and if the jury should be further of the opinion that the plaintiff did actually advance to the defendant the amount of the said supposed earnings of the stock, under a belief created by the defendant that such dividend would be made, that then the plaintiff would be entitled to recover back the money so paid under such mistaken impression, if the jury should find from the evidence that there was no such dividend declared; and that the said stock had not, at the time of the said contract, earned any such supposed interest or dividend.

This instruction was ultimately given by the court. In discussing its correctness, it is necessary to recollect that this is an action on a

written contract, not for deceit or misrepresentation in making that contract. The inquiry then is, what was the contract? Not how it was obtained. The representation, then, of the seller, respecting the next dividend, and the belief of the purchaser, may be discarded from the case; and our attention must be confined to the contract as stated in the prayer of counsel. The jury were instructed to find for the plaintiff, if they were satisfied from the evidence that the defendant, in his written contract, agreed to sell his stock at par; and to take the earnings which the said stock had made, in lieu of the dividend to be declared at the next dividend day; and if they should also be satisfied that the plaintiff did actually advance to the defendant the amount of the said supposed earnings of the stock, under a belief that such dividend would be made. This instruction, when given on the naked contract, stripped of that alleged misrepresentation which forms no part of it, cannot, we think, be supported.

We are therefore of opinion that there is error in the proceedings of the circuit court, and that the judgment ought to be reversed, and the cause remanded to the circuit court, with directions to set aside the verdict and award a *venire facias de novo.*

This cause came on, &c., on consideration whereof this court is of opinion that there is error in the several instructions given by the circuit court to the jury, in this, that the said court instructed the jury that the evidence given by the plaintiff in that court was competent to support both the first and second counts in [*603] the declaration, and also in this, that the said * court instructed the jury that so much of the said contract as relates to the advance of the three per cent. portion of the dividend is executory, in so far as regarded the implied *assumpsit* of the defendant to refund the said three per cent. advance, in the event of there being no dividend on the said dividend day; and also in this, that the said court instructed the jury to find for the plaintiff, if they should be satisfied from the evidence that the defendant, in his written contract, agreed to sell his stock at par, and to take the earnings which the said stock had made in lieu of the dividend to be declared at the next dividend day, and that in fact no dividends were made. Wherefore, it is considered and adjudged by this court that the said judgment be and the same is hereby reversed and annulled, and that the cause be remanded to the circuit court, with directions to award a *venire facias de novo*, and to take other proceedings according to law.

5 H. 278; 14 H. 253.

HUMPHREY FULLERTON, JOHN CARLISLE, AND JOHN WADDLE, Plaintiffs in Error, *v.* THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF THE UNITED STATES, Defendants in Error.

1 P. 604.

Though written rules are preferable for the purpose of adopting a practice created by a state law, yet the circuit courts of the United States may do this without a written rule, and such adoption is sufficiently evidenced by the course and usage of the court.

There is nothing in the constitution or laws of the United States, to prevent the circuit court of the United States for Ohio from adopting the act of that State concerning actions against drawers and indorsers.

It is sufficient evidence of a demand of payment of a note made payable at a particular bank, that the note was at the bank, was its property, and was unpaid at maturity.

If a note is discounted in renewal of a former note, the law does not prevent the bank from charging the former note to the last indorser, and crediting him with the proceeds of the last note.

THE case is stated in the opinion of the court.

The act of Ohio drawn in question was as follows:—

[* 606] * "That when any sum of money due and owing to any bank or banker shall be secured by indorsements on the bill, note, or obligation for the same, it shall be lawful for such bank or banker to bring a joint action against all the drawers or indorsers, in which action the plaintiff or plaintiffs may declare against the defendants jointly for money lent and advanced, and may obtain a joint judgment and execution for the amount found to be due; and each defendant may make the same separate defence against such action, either by plea or upon trial that he could have made against a separate action; and if in the case herein provided for, the bank or banker shall institute separate action against drawers and indorsers, such bank or bankers shall recover no costs: provided always, that in all suits or actions prosecuted by a bank or banker, or persons claiming as their assignees or under them in any way for their use or benefit, the sheriff upon any execution in his hands in favor of such bank or banker, their or his assignee as aforesaid, shall receive the note or notes of such bank or banker from the defendant in discharge of the judgment, and if such bank or banker, their or his assignee or other person suing in trust for the use of such bank or banker, shall refuse to receive such note from the sheriff, the sheriff shall not be liable to any proceedings whatever at the suit, or upon the complaint of the bank or banker, their or his assignee as aforesaid."

Leonard, for the plaintiffs.

Sergeant, contrà.

[* 611] * JOHNSON, J., delivered the opinion of the court.

This cause comes up from the circuit court of Ohio on a writ of error. The record exhibits a judgment recovered by the defendants here against the plaintiffs, in an action for money

[* 612] lent *and advanced. The plea was *non assumpsit*, with notice of a discount and a verdict for plaintiff below.

The errors assigned arise upon various bills of exception, the first of which was taken to the evidence offered to maintain an action, in these words: "The plaintiff in support of his action, offered in evidence the following promissory note drawn by Isaac Cook, and indorsed by Humphrey Fullerton, John Waddle, and John Carlisle."

"$4,000. *Cincinnati, February* 1, 1820.

Sixty days after date I promise to pay John Carlisle, or order, at the office of discount and deposit of the bank of the United States at Cincinnati, four thousand dollars, for value received.

(Signed,) ISAAC COOK.

Indorsed—*John Carlisle, John Waddle, Humphrey Fullerton.*"

"To the introduction of this evidence the defendant, by his counsel, objected, as evidence of a several contract of the drawer and each of the indorsers on the note, and not of any joint undertaking or liability of the defendants; which objection was overruled by the court, and the note permitted to be read in evidence under the act of the general assembly of Ohio, entitled 'an act to regulate judicial proceedings where banks and bankers are parties, and to prohibit the issuing of bank-bills of certain descriptions,' passed 18th of February, 1820, to which decision the council excepted."

Cook, it appears, was originally made a party defendant to the action, but died pending the suit; the plaintiff suggested his death on the record, and went to trial against the remaining three defendants.

In order to understand the bearing which the instruction moved for has upon the cause, it is necessary to remark that the State of Ohio was not received into the Union until 1802, so that the Process Act of 1792,[1] which is expressly confined in its operation to the day of its passage, in adopting the practice of the state courts into the courts of the United States, could have no operation in that State. But the district court of the United States established in the State in 1803, was vested with all the powers and jurisdiction of the district court of Kentucky, which exercised full circuit court jurisdiction with power to create a practice for its own government.

[1] 1 Stats. at Large, 275.

The district court of Ohio it appears did not create a system for itself, but finding one established in the State in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state courts, or in effect adopted by a single rule the state system * of practice in [*613] the same mode in which this court at an early period, adopted the practice of the king's bench in England. So that when the seventh circuit was established in the year 1807, the judge of this court who was assigned to that circuit, found the practice of the state courts adopted in fact into the circuit court of the United States.

It has not been deemed necessary to make any material alterations since; but as far as it was found practicable and convenient, the state practice has, by an uniform understanding, been pursued by that court without having passed any positive rules upon the subject. The act of the 18th of February, 1820, alluded to in the bill of exceptions, was a very wise and benevolent law, calculated, principally, to relieve the parties to promissory notes from accumulated expenses. Its salutary effects produced its immediate adoption into the practice of the circuit court of the United States; and from that time to the present, in innumerable instances, suits have been there prosecuted under it. The alteration in practice, (properly so called,) produced by the operation of this act, was very inconsiderable, since it only requires notice to be given of the cause of action by indorsing it on the writ and filing it with the declaration, after which the defendants were at liberty to manage their defence, as if the note had been formally declared upon in the usual manner.

It is not contended that a practice, as such, can only be sustained by written rules; such must be the extent to which the argument goes, or certainly it would not be supposed that a party pursuing a former mode of proceeding, sanctioned by the most solemn acts of the court, through the course of eight years, is now to be surprised and turned out of court, upon a ground which has no bearing upon the merits.

But we are decidedly of opinion the objection cannot be maintained. Written rules are unquestionably to be preferred, because their commencement, and their action, and their meaning, are most conveniently determined; but what want of certainty can there be, where a court by long acquiescence has established it to be the law of that court, that the state practice shall be their practice, as far as they have the means of carrying it into effect, or until deviated from by positive rules of their own making. Such, we understand, has been the course of the United States court in Ohio for twenty-five

years past. The practice may have begun and probably did begin in a mistaken construction of the Process Act, and then it partakes of the authority of adjudication. But there was a higher motive for adopting the provisions of this law into the practice of that court; and this bill of exceptions brings up one of those difficult [*614] questions, which must often occur in a court in which *the remedy is prescribed by one sovereign, and the law of the contract by another. It is not easy to draw the line between the remedy and the right, where the remedy constitutes so important a part of the right; nor is it easy to reduce into practice the exercise of a plenary power over contracts, without the right to declare by what evidence contracts shall be judicially established. Suppose the State of Ohio had declared that the undertaking of the drawer and indorser of a note shall be joint and not several, or contingent, and that such note shall be good evidence to maintain an action for money lent and advanced; would not this become a law of the contract? where then would be the objection to its being acted upon in the courts of the United States? Would it have been prudent or respectful, or even legal, to have excluded from all operation in the courts of the United States an act which had so important a bearing upon the law of contracts as that now under consideration? An act in its provisions so salutary to the citizen, and which, in the daily administration of justice in the state courts, would not have been called upon otherwise than as a law of the particular contract; a law which, as to promissory notes, introduced an exception into the law of evidence and of actions. It is true, the act in some of its provisions has inseparably connected the mode of proceeding with the right of recovery. But what is the course of prudence and duty where these cases of difficult distribution, as to power and right, present themselves? It is to yield rather than encroach; the duty is reciprocal, and will, no doubt, be met in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our very pecular relations, cases may occur in which the maintenance of principle and the administration of justice, according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our courts must do their duty; but, until then, it is administering justice in the true spirit of the constitution and laws of the United States to conform, as nearly as practicable, to the administration of justice in the courts of the State.

In the present instance, the act was conceived in the true spirit of distributive justice; violated no principle; was easily introduced into the practice of the courts of the United States; has been there acted upon through a period of eight years, and has been properly treated

as a part of the law of that court. But it is contended that it was improperly applied to the present case, because the note bears date prior to the passage of the law; and this certainly presents a question which is always to be approached with due precaution, to wit, the extent of legislative power over existing contracts.

But what right is violated, what hardship or injury produced, *by the operation of this act? It was passed for [*615] the relief of the defendant, and is effectual in relieving him from a weight of costs, since it gives to the plaintiff no more than the costs of a single suit, if he should elect to bring several actions against drawer and indorser. Nor does it subject the defendants to any inconvenience from a joint action, since it secures to each defendant every privilege of pleading and defence of which he could avail himself if severally sued. The circuit court has incorporated the action, with all its incidents, into its course of practice; and having full power by law to adopt it, we see no legal objection to its doing so, in the prosecution of that system upon which it has always acted. It cannot be contended that the liabilities of the defendants under their contract have been increased, or even varied; and as to change in the mere form of the remedy, the doctrine cannot be maintained that this is forbidden to the legislative power or to the tribunal itself, when vested with full power to regulate its own practice.

The next bill of exceptions has relation exclusively to the discount. It sets out a great deal of evidence, and sixteen specifications, if they may be so called, of the prayers asked of the court by the defendant's counsel; the whole making out this case. It appears that in December, 1817, Isaac Cook's note, with these indorsers upon it, was discounted at the Bank of Cincinnati, and renewed every sixty days down to February 1, 1820. It commenced at $6,000, and in September, 1818, was reduced to $4,000, for which amount it was renewed uniformly down to the last date. In its origin, one M'Laughlin's name was also on the paper, and sometimes he, and sometimes Cook, was the last indorser, until March, 1819, when Cook was uniformly the last indorser down to the date of the present note. The proceeds of the successive renewals were, of course, credited to him, and passed to the payment of the preceding note.

But on this note Fullerton stands as the last indorser, and the proceeds were credited to him, and Cook's note of the preceding date was charged to Fullerton's account without his check; thus balancing the credit which the discounting of the last renewal gave to Fullerton on the books of the bank. The note so charged was, of course, not protested, and thus Fullerton and his coindorsers escaped payment of that note; and now they propose to escape the payment

of this, by insisting that without a check from Fullerton, authorizing the application of the proceeds as credited to him to the payment of the previous note, the bank is still indebted to him to that amount. This is an ungracious defence, and one which no court of justice can feel disposed to sustain. To repel it, the plaintiffs introduced witnesses to prove that this note was expressly discounted in
[* 616] * order that the proceeds might be applied to the previous note, and would not have been discounted otherwise; and contend that the bank, having the fund in hand to pay itself, had a right so to apply it without a check, upon the ground of implied assent. With a view to that question, the defendants below have introduced thirteen out of sixteen of their prayers. They all go to maintain the single proposition, that Fullerton, as last indorser, was entitled to credit for the proceeds of this note, and is still entitled, if they have not been legally applied to the payment of the note which preceded it.

The remaining three prayers, to wit: the 13th, 14th, and 15th, raise a question on the sufficiency of the demand on the drawer, and of the notice of non-payment to the indorser, and the proof introduced to establish both facts.

The entry in the record on the subject of the charge to the jury, is in these terms: "But the court instead of the foregoing instructions as asked, charged and instructed the jury that to enable the plaintiffs to recover, the jury ought to be satisfied, from the evidence, that the note had been discounted by, and become the property of the bank; that it was in the bank and not paid when it came to maturity; that due notice of the protest and non-payment had been given to the parties, and that such notice had been put into the post-office the day after the last day of grace in time to go by the succeeding mail; that every note discounted in bank, was *primâ facie* to be regarded as a business note, and that when such notes were discounted, generally and regularly, the proceeds of the note should be carried to the credit of the last indorser, and paid to his check; that the printed and published rules of the bank ought, in the absence of other testimony, to be considered as regulating the course of business of the bank; but that if the jury were satisfied, from the evidence, that a practice and course of business in the office of discount and deposit in Cincinnati had prevailed and was known to defendants, and that the note in question had been discounted and treated in all respects according to such practice and course of business, but not according to the printed rules, the plaintiffs had a right to recover. That the bank had not a right to apply the proceeds of the note contrary to the understanding and directions of the last indorser, or to any other

use than the use of the last indorser, without his consent; but that if the jury were satisfied from the evidence that, according to the custom and practice of the bank, in the case when a new note was put into the bank for the purpose of renewing and continuing a former loan or discount, the check of the last indorser was sometimes required, and sometimes dispensed with, and that, in the latter case, it was the practice to file away the old note as a check, and that if the note sued upon had been * discounted and [*617] treated in the latter manner, with the consent of the parties to it, the plaintiffs had a right to recover; and that such consent may be inferred and found by the jury from the facts and circumstances given in evidence without direct or positive proof, if in the opinion of the jury the facts and circumstances proved warrant such inference. That if the jury find the note was not discounted, the plaintiff cannot recover, or if they find that it was discounted but the proceeds remain in the bank carried to the credit of the last indorser, and not drawn or applied with his consent to any other purpose, the money may and ought to be set off against the note; but if they find that the note sued on was put into bank for the purpose of renewing a former note or loan, and for no other purpose, and with the understanding of all the parties that if discounted the proceeds could and would, by the course of business in the bank be applied solely to the discharge of the former note, and that they had been so applied, and the old note retained and written off as a check, by the bank, that the plaintiffs ought to recover."

The exception taken is to refusing to give the instructions as asked, and to giving them in the form in which they were propounded to the jury. And the question is whether the instruction given covered the whole ground of the instructions prayed for, and were legally correct, in the form in which they were rendered.

We are of opinion they cover the whole ground taken by the defendants, or at least as far as they had a right to require. This will be obvious from a simple analysis of the charge. The propositions which it imports will be examined in their order. The first is upon the sufficiency of the demand, and the law laid down on this point is, "that on a note made payable at a particular bank, it is sufficient to show that the note had been discounted and become the property of the bank, and that it was in the bank, not paid at maturity."

Nothing more than this could have been required of the court; for the positive proof that the bill was not paid, will certainly imply that there were no funds of the drawer there to pay it. The fact could not have been made more positive by inspection of the books. The charge is, perhaps, too favorable to the defendants, since modern de-

sions go to establish that if the note be at the place on the day it is payable, this throws the *onus* of proof of payment upon the defendant. 4 Johns. 188. This is more reasonable than to require of the plaintiff the proof of a negative, and comports better with the general law of contracts.

The next instruction is in the language of the court, "that notice of the non-payment and protest should have been given to the indorser through the medium of the post-office, the day after
[*618] *the last day of grace, in time to go by the succeeding mail."

The defendant's counsel, in arguing on this part of the instruction, insisted much on the obligation on the plaintiff to establish definitively and positively, that the notice given was in time to go by the next mail, but has not adverted to his own omission in not putting into the case evidence that there was a mail established from Cincinnati to the place of the defendant's residence. Yet, if the jury might be left on this point to take that fact upon notoriety or personal knowledge, it would be difficult to maintain that they might not, on the same grounds, find the minor fact, that the notice deposited in any part of the business hours of that day would be in time for the mail ensuing the third day of grace. It is argued that the language used by the court on this point is equivocal, and may have led the jury to suppose that sending the notice by the mail which succeeded the day after the last day of grace, was sufficient. But we think the construction is forced. The words are, "the day after the last day of grace in time to go by the succeeding mail." Succeeding what? Obviously, the last day of grace; otherwise, there might be no necessity for putting it in the office until the second day after the last day of grace, whereas the necessity of putting it in on the first day after is expressed in the charge.

With this signification, it was rather more favorable than need be given, since the mail of the next day may have gone out before early business hours, or no mail may have gone out for several days.

The residue of the charge relates to the application of the proceeds of this note to the previous note without the check of the last indorser, and this also, we think, embraces all the defendants asked, and is as favorable as the law would sanction. It admits that this should be regarded as a business note, that the proceeds should have been passed to the credit of the last indorser, and should not have been applied otherwise than by his assent; but it then goes on to assert, what surely could not be controverted, that with the assent of the last indorser, the money instead of being passed to his credit might be otherwise applied; that with his consent it might be applied to

the satisfaction of another note, for which he was indorser, without his checking for the amount; and that his consent may be implied from circumstances, as all other facts may be.

The jury have found, then, that with his consent it was so applied, and the evidence fully bore them out in their finding; if competent, it was all the law requires.

It may be proper to observe that every discount is in the nature of a cross-action, and if the discount filed in this case were * thrown into the form of an action, it would be for money [*619] had and received to defendant's use.

The merits of this defence need only be tested by the law which governs that action, to make it clear that the evidence would not sustain it. It goes, in fact, to show that, in what are called renewals of bank loans, the lending is qualified, and not absolute; that, when credit is given and money advanced upon a note of that description, it is not an advance on general account, but only for the purpose of a specific application. Any act done by the bank, therefore, whatever be the mere form, if it have for its end the carrying of the contract into effect, in its true spirit and intent, must be binding upon all the parties to the contract. Nothing more is affirmed in this charge or verdict.

One general objection was taken in argument to the instruction given, importing a charge of inconsistency, inasmuch as, although it admits the note to be a business note, as it is called, and therefore to be passed to the credit of the last indorser, it permits it to be treated as an accommodation note, in allowing it to be passed to the credit of the drawer. But if this were strictly the fact, what defence does it afford to the action, if such were the agreement and the real understanding of the parties? In strictness, however, it was not passed to the credit of the drawer alone; for, in the progress of the ruinous system of loans, which prevails over the country, the note discounted as the renewal of an accommodation note cannot be called a business note, nor can it, in correctness, be predicated of such a note that it is passed to the credit of the drawer alone, when the last indorser has, in effect, an equal relief from the application of the proceeds.

We do not deem it necessary to consider a question commented upon in argument by the counsel for the bank, and perhaps glanced at by the opposite counsel, whether this note was not void as an accommodation note under the rules of the bank, because not secured by a deposit of stock.

No one of the exceptions raises the question, and we should think it injustice to the counsel for the plaintiffs here to suppose that he intended to raise it. *Judgment affirmed, with costs.*

2 P. 96, 543; 5 P. 190; 11 P. 351.

JAMES M'DONALD, Appellant, *v.* FREEMAN SMALLEY and others, (in all, forty.)

1 P. 620.

If a real conveyance of land has been made to a citizen of another State, who brings his action therefor, it is of no importance that the grantor was induced to convey because he thought his title would be held good in a court of the United States, and bad in a court of the State, nor that the conveyance, though in form absolute, was really but a mortgage.

The practice of the circuit courts in equity has been prescribed by this court, and should be followed to the exclusion of the practice of the state courts.

If the circuit court has dismissed the bill for want of jurisdiction, and the decree is reversed, this court will not hear the merits, but remand the cause.

THE case is stated in the opinion of the court.

Baldwin and *Doddridge*, for the complainant.

Hammond, contrà.

[*621] *Before the argument commenced, the counsel for both parties asked instructions of the court upon the question whether, as the record contained the whole of the proceedings in the cause, and exhibited all the matters either party required for a final disposition of the case in this court, upon all the points in controversy, this court would permit the argument to go to the whole case, so that a decree could be given here upon the whole case, or whether, an opinion upon the jurisdiction only having been given in the circuit court, the argument should be confined to that question. The court having advised upon the subject, directed the counsel to argue the point of jurisdiction only, as no other than that had been decided in the court from which the appeal had been taken.

[*623] *MARSHALL, C. J., delivered the opinion of the court.

This suit was instituted in the circuit court of the United States for the seventh circuit, and district of Ohio, to obtain a conveyance of a tract of land lying in what is termed "the military district," claimed by the complainant under a patent younger than that under which it is held by the defendants. The complainant is a citizen of Alabama, and claims the land under a conveyance from Duncan M'Arthur, who is a citizen of Ohio. The defendants objected to the jurisdiction of the court; and, after hearing the parties upon this point, the court dismissed the bill, being of opinion that its jurisdiction could not be sustained. From this decree the complainant has appealed, and the cause is now before this court on the question of jurisdiction.

The bill states the complainant to be a citizen and resident of the State of Alabama, and the defendants to be citizens and residents of the State of Ohio. It has not been alleged, and certainly cannot be alleged, that a citizen of one State having title to lands in another, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the State in which the lands lie; consequently, the single inquiry must be whether the conveyance from M'Arthur to M'Donald was real or fictitious?

The transaction, as laid before the court, appears to be this: M'Arthur was apprehensive that his title could not be sustained in the courts of the State in which alone he could sue; and, being indebted to M'Donald in the sum of $1,100, offered to sell and convey to him the land in controversy, in payment of *this [*624] debt. The letter in which this offer was made expresses the opinion that his title was good, and would most probably be established in the courts of the United States, but would fail in the courts of the State. He estimates the property as being worth much more than the sum he is willing to take for it, but in consequence of the difficulties attending the title, he is willing to convey it in satisfaction of the debt. He suggests that if M'Donald should be disinclined to engage in the controversy himself, he might make an advantageous sale to some of his neighbors who might be disposed to emigrate to Ohio, and offers to render any service in his power to the proprietor of the land, in the prosecution of the claim in the courts of the United States.

The contract was concluded by a letter, written in answer to that which has been stated, of which the said M'Donald retained no copy. There was no special agreement between the plaintiff and M'Arthur when the deed was written, but perhaps some proposition by letter. He gave his bond to a third party for making a quitclaim title to the land, on condition of receiving from him $1,100.

This testimony, which is all that was laid before the court, shows, we think, a sale and conveyance to the plaintiff which was binding on both parties. M'Donald could not have maintained an action for his debt, nor M'Arthur a suit for his land. His title to it was extinguished, and the consideration was received. The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court cannot enter into them when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit are citizens of different States.

The only part of the testimony which can inspire doubt respecting its being an absolute sale, is the admission that the plaintiff gave his bond to a third party for a quitclaim title to the land, on paying him $1,100. We are not informed who this third party was, nor do we suppose it to be material. The title of M'Arthur was vested in the plaintiff, and did not pass out of him by this bond. A suspicion may exist that it was for M'Arthur. The court cannot act upon this suspicion.

But suppose the fact to be avowed, what influence could it have upon the jurisdiction of the court? It would convert the conveyance, which on its face appears to be absolute, into a mortgage. But this would not affect the question. In a contest between the mortgagor and mortgagee, being citizens of different States, it [*625] cannot be doubted that an ejectment, or a bill * to foreclose, may be brought by the mortgagee, residing in a different State, in a court of the United States. Why, then, may he not sustain a suit in the same court against any other person, being a citizen of the same State with the mortgagor. We can perceive no reason why he should not. The case depends, we think, on the question whether the transaction between M'Arthur and M'Donald was real or fictitious; and we perceive no reason to doubt its reality, whether the deed be considered as absolute or as a mortgage.

A question has been made, whether the circuit court ought to have noticed the testimony on the conveyance under which the plaintiff claims, because it was brought irregularly before them.

By a law of the state, interrogatories may be propounded by the defendant in his answer, which the plaintiff is compelled to answer as if they had been propounded in a cross-bill.

Although this point has become unimportant in this cause, the court thinks it proper to say that the rules which govern the practice of the circuit courts in chancery, have been prescribed by this court, and ought to be observed.

We think there is error in the decree of the circuit court dismissing the complainant's bill, and that the same ought to be reversed, and the cause remanded for further proceedings, according to law.

This case came on, &c., and was argued on the point of jurisdiction, on consideration whereof this court is of opinion that there is error in the decree of the said circuit court dismissing the complainant's bill. It is therefore decreed and ordered by this court that the decree of the said circuit court in this cause be and the same is hereby reversed and annulled. And it is further ordered that the cause be remanded to the said circuit court for further proceedings to be had therein, according to law and justice.

7 H. 198; 19 H.72.

DUNCAN M'ARTHUR, Plaintiff in Error, *v.* WESLEY S. PORTER'S LESSEE.

1 P. 626.

A verdict conditioned to be for the plaintiff, or defendant, as the court should be of opinion for one or the other party upon the effect of a certain deed, but not identifying the deed, is insufficient to support a judgment.

THE case is stated in the opinion of the court.

Baldwin, for the plaintiff.

Ewing, contrà.

MARSHALL, C. J., delivered the opinion of the court.

This was an ejectment in the court for the seventh circuit and district of Ohio, in which the jury found a verdict in the following words: "We the jury find the defendant guilty of the trespass and ejectment, in the declaration mentioned, and assess the plaintiff's damages to six cents, which verdict is thus rendered, subject to the opinion of the court on the question reserved by consent of parties, as to so much of the land in controversy as is contained in the deed of the sheriff of Ross county, to the said defendant, bearing date the day of 1802, and upon that part of the land included in said deed. If the opinion of the court on the question so reserved by consent, shall be with the plaintiff, that the said deed is not valid to pass the land therein described, then we the jury find the defendant guilty of the trespass and ejectment in the declaration mentioned, accordingly, for that part also; and if the opinion of the court thereon shall be in favor of the defendant, that said deed, with the other evidences exhibited as part of said title, is valid to pass the fee to the defendant; then the jury find the defendant not guilty of the trespass and ejectment in the said declaration mentioned, as to that part of the lands and premises in controversy."

This conditional verdict is for the plaintiff, or defendant, *according to the opinion of the court on the validity of a [* 627] deed with the other evidences exhibited as part of said title. But this deed, and these other evidences of title are not exhibited to the court in such manner as to enable us to notice them. A deed does, indeed, form a part of a bill of exception taken to the opinion of the court, on a motion subsequently made for a new trial. But the court cannot know, judicially, that this is the same deed which is referred to in the verdict, or what are the other evidences of title which are connected with it. The verdict is too imperfect to enable the court to render judgment on it.

The judgment of the circuit court is therefore reversed, and the cause remanded to the circuit court with directions to set aside the verdict, and to award a *venire facias de novo.*

JAMES JACKSON, Ex-demise of LAZY ANDERSON *v.* JOHN CLARK and ROBERT ELLISON.

1 P. 628.

The United States having received the cession of the lands northwest of the Ohio River not only in trust for the Virginia troops on the continental establishment, but also for the use and benefit of the members of the confederation, have the right to prescribe the time within which Virginia military warrants might be located, and to annex conditions to the extension of the time.

Under the act of March 2, 1807, (2 Stats. at Large, 424,) defective surveys protected the land from being patented under subsequent warrants and surveys by those claiming under the United States.

THE case is stated in the opinion of the court.

Leonard and *Hammond*, for the plaintiff.

Creighton and *Ewing*, contrà.

[*632] *MARSHALL, C. J., delivered the opinion of the court.

This is an ejectment brought by the plaintiff in error in the court of the United States for the seventh circuit and district of Ohio, to recover a tract of land lying in the military district.

The plaintiff offered, as his title, a patent from the government of the United States, bearing date the 10th of November, 1824.

The defendants then introduced a certified copy of an entry and survey of the lands in controversy, sworn to by Richard G. Anderson, the principal surveyor of the Virginia military district; the survey purporting to have been made on the 10th of October, 1796, and recorded on the 15th of April, 1812, founded on an entry, bearing date the 19th day of July, 1796, for 553 acres of land in the name of Nathaniel Massie, assignee, numbered 2,744, and founded upon Leven Powell's warrant, for 2,000 acres, No. 3,398, and Thomas Goodwin's warrant for 200 acres, No. 1,930. It was admitted, that the defendants were purchasers from Massie, prior to the year 1796; entered into possession of the premises under the said purchases, and received a conveyance from him, before the year 1812. It was also admitted, that the plaintiff's entry was made on the 10th of June, 1824, and his survey on the 20th of the same month.

The defendant relied on this survey, and on the proviso of the act passed the 2d of March, 1807, entitled "An act to extend the time for locating Virginia military warrants, &c." This act [*633] annexes the following proviso to the permission it *grants to obtain warrants for military service, and to make locations within the military district: "Provided, that no locations as afore-

said, within the aforesaid mentioned tract, shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had been previously surveyed, and any patent which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered as null and void."

To show that the survey set up by the defendants was not protected by the proviso in the act of congress, the plaintiff offered to prove, that the warrants on which it was founded were satisfied before that entry was made. For this purpose, he offered in evidence, two entries, amounting to 1,597 acres, on Powell's warrant, made in Powell's name the 30th of December, 1791, surveyed by Massie on the 3d of January, 1792, the survey recorded on the 10th of the same month; plots and certificates taken from the office by Massie, the 11th of July, 1795, and a patent issued to him on the 19th September, 1799; also an entry for 403 acres, the residue of Powell's warrant, made in the name of Nathaniel Massie, on the 27th of January, 1795, surveyed on the 27th December, 1796, the survey recorded on the 9th of June, 1797; the plot and certificate, together with the warrant supposed to be satisfied, taken out of the office by Massie, on the 14th of June, 1797, and a patent issued to his heirs on the 3d of December, 1814.

He also offered in evidence an entry for fifty acres made on Thomas Goodwin's warrant, in the name of John Walker, assignee, the 17th of September, 1795, surveyed the 30th of March, 1820, and patented on the 19th of November, 1825; also an entry for 150 acres, the residue of the said warrant, made on the 16th of June, 1795, in the name of the said Massie, surveyed on the 1st of July in the same year; survey recorded the 10th of the same month, and a patent issued to Massie on the 15th of February, 1800.

The plaintiff also offered the deposition of Richard C. Anderson, the principal surveyor, who deposed, that the survey of 553 acres, which was given in evidence by the defendants, was illegally made, and admitted by him ignorantly and improperly, to record; and that he had marked the same on the record of his office, "error;" but he does not state the time when this mark was made. He adds, that he had refused to grant a plot, and certificate of survey, being of opinion that the whole of the warrants had been previously satisfied.

The defendants moved the court to reject the authenticated copies, and testimony aforesaid, as inadmissible evidence; which motion was granted by the court, upon the ground that the act of congress confirmed the survey of the defendants, *and annulled the plaintiff's patent. An exception was taken to this opinion. A verdict and judgment having been given for the [*634]

defendants, the plaintiff has brought the cause into this court by writ of error.

Two points have been made by the counsel for the plaintiff. They contend: —

1. That congress could not rightfully limit the time within which military warrants should be located and surveyed.

2. That the act of congress prohibiting locations on lands already surveyed, and declaring any patent which should be issued on such survey void, does not comprehend the survey in this case.

The first point to be considered, is the objection to the limitation of time prescribed by congress, within which the military warrants granted by Virginia should be located. The plaintiff contends that no limitation can be fixed.

In the October session of 1783, the legislature of Virginia passed an act ceding to congress the territory claimed by that State, lying northwest of the River Ohio, under certain reservations and conditions in the act mentioned. One of these was: "That in case the quantity of good land on the southeast side of the Ohio, upon the waters of the Cumberland River, and between the Green River and Tennessee, which has been reserved by law for the Virginia troops, on the continental establishment, should, from the North Carolina line bearing in further upon the Cumberland lands than was expected, prove insufficient for their legal bounties, the deficiency should be made up to the said troops in good lands to be laid off between the Rivers Scioto and Little Miami, on the northwest side of the River Ohio, in such proportions as have been engaged to them by the laws of Virginia."

This is not a reservation of the whole tract of country lying between the rivers Scioto and Little Miami. It is a reservation of only so much of it as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the southeast side of the Ohio. The reservation is made in terms which indicate some doubt respecting the existence of the deficiency, and an opinion that it will not be very considerable. Subsequent resolutions of the Virginia legislature have added very much to the amount of these bounties. The residue of the lands are ceded to the United States, for the benefit of the said States, "to be considered as a common fund for the use and benefit of such of the United States as have become, or shall become members of the confederation or federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and

[* 635] * expenditure; and shall be faithfully and *bonâ fide* dis-

posed of for that purpose, and for no other use or purpose whatever."

The government of the United States then received this territory in trust, not only for the Virginia troops on the continental establishment, but also for the use and benefit of the members of the confederation; and this trust is to be executed "by a faithful and *bonâ fide*" disposition of the land for that purpose.

We cannot take a retrospective view of the then situation of the United States without perceiving the importance which must have been attached to this part of the trust. A heavy foreign and domestic debt, part of the price paid for independence, pressed upon the government; and the vacant lands constituted the only certain fund for its discharge. Although, then, the military rights constituted the primary claim on the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view that other object which was also of vital interest. This was to be effected only by prescribing the time within which the lands to be appropriated by these claimants should be separated from the general mass, so as to enable the government to apply the residue, which it was then supposed would be considerable, to the other purposes of the trust. The time ought certainly to be liberal. But unless some time might be prescribed, the other purposes of the trust would be totally defeated; and the surplus land remain a wilderness.

This reasonable, and, we think, necessary, construction, has met with general acquiescence. Congress has acted upon it, and has acted in such a manner as not to excite complaints, either in the State of Virginia, or the holders of military warrants.

If the right existed to prescribe a time within which military warrants should be located, the right to annex conditions to its extension follows as a necessary consequence. The condition annexed by congress has been calculated for the sole purpose of preserving the peace and quiet of the inhabitants, by securing titles previously acquired. We are to inquire whether the case of the defendants is within it.

2. It has been contended that the prohibition in the act of the 2d of March, 1807, to make locations on lands which had been previously surveyed, does not extend to the survey of the defendants, because that survey was made on warrants which had been previously satisfied. The word "survey," as used in the law, is not satisfied by the mere circumstance that a chain has followed a compass round a particular piece of ground; but requires that it should be made in virtue of a warrant for the purpose of appropriating land to

which the holder of that warrant is entitled by law. The [*636] warrant can be an authority * for surveying and appropriating so much land only as it professes to grant; and this necessary limitation, could it require confirmation, is confirmed by the act of the 9th of June, 1794,[1] which regulates the manner of issuing patents on surveys for less than the whole quantity of land specified in the warrant. That act contains a proviso, "That no letters-patent shall be issued for a greater quantity of land than shall appear to remain due on such warrants." As patents had issued for the whole quantity of land specified in the warrants on which the survey of the defendants professes to be founded, previous to the entry of the plaintiff, no patent could at that time have been obtained by the defendants; and therefore the saving in the statute could not have been intended for their survey.

The court has felt the weight of this argument, and has bestowed upon it the most deliberate consideration.

The act of the 23d of March, 1804,[2] is the first act which prescribes the time within which the holders of military warrants shall make their locations and surveys. That act requires that the locations shall be made within three years from its passage. On the 2d of March, 1807, the first act was passed giving a further time of three years for making locations, and of five years for returning surveys. This act contains the proviso of which the defendants claim the benefit. In every act which has been since passed prolonging the time for making entries and returning surveys on military warrants, the same proviso has been introduced. It was enacted in March, 1807, and has continued in force ever since. It constitutes a limitation to the right given by all subsequent laws, to locate and survey military warrants.

If it be conceded that this proviso was not intended for the protection of surveys which were in themselves absolutely void, it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes itself a nullity. We must therefore inquire to which class the survey of the defendants belongs.

Nathaniel Massie was probably the proprietor of Leven Powell's whole warrant of 2,000 acres, certainly of 403 acres part thereof, when he made the entry under which the defendants claim. He was also the proprietor of 150 acres, part of Thomas Goodwin's warrant. We say he was at that time the proprietor of those warrants, because he made an entry for 403 acres, part of Powell's warrant, in his own name, on the 27th of January, 1795, and an entry

[1] 1 Stats. at Large, 394. [2] 2 Ib. 274.

for 150 acres, part of Goodwin's warrant, in his own name, on the 16th of June, 1795; both which entries were afterwards surveyed and patented for himself and his heirs. These two entries amount to 553 acres, the *quantity for which the entry [*637] sold to the defendants was made. Being thus the proprietor of both these entries, and of the warrants on which they were founded, he makes an entry in his own name, on the 19th July, 1796, for the same quantity of 553 acres. This last entry, the warrants being satisfied if the previous entries remained in force, was inconsistent with the two preceding entries. It ought not to have been made by him nor allowed by the principal surveyor, unless those preceding entries were withdrawn. According to the usage of the office, as stated in Taylor's Lessee *v.* Meyers, 7 W. 23, Massie had the power to withdraw them. Had he expressed to the surveyor-general his wish to withdraw them, and to reënter the warrants, his wish would not have been opposed. But, without expressing this wish, so far as the case shows, he made the entry in question. This act was lawful if the two preceding entries were removed; unlawful if they stood. The officers of the government did their duty if this entry displaced the two which preceded it; but violated their duty if it had not this effect. Unquestionably, in an office regularly kept, the withdrawal of an entry ought to appear upon the record; but had this office been regularly kept, the last entry could not have been allowed, unless accompanied by a withdrawal of those which were inconsistent with it.

Had Nathaniel Massie transferred his right to the last two preceding entries, previous to the time of making this for the defendants, so that the contest was between purchasers, the prior entries could not have been affected by his subsequent act. But he had not transferred his right to them; the contest, had one arisen, would not have been between purchasers, but between a purchaser and the wrong-doer himself. Can it be doubted how such a controversy would have terminated? Nathaniel Massie, being the proprietor of 553 acres of military land warrants, enters them on lands which they might lawfully appropriate; afterwards, possessing a perfect right to cancel this entry, and locate the warrants elsewhere, he does locate them elsewhere, and sells this location to a purchaser for a valuable consideration without notice. It cannot, we think, be doubted that a court of equity would at any time, while Massie remained the owner of the prior entries, relieve such purchaser by annulling the entries which obstructed the title of the purchaser, or decreeing that Massie should withdraw them, or enjoining him from carrying them into grant. Had the plot and certificate of survey, with the accompanying

vouchers required by law, been presented by the defendants, previous to the proceedings taken by Massie to obtain patents for himself, a grant would have issued to the defendants. Their survey then was not an absolute nullity. It might have been supported in a [*638] *court of equity, and had the defendants, instead of trusting as they probably did to Massie for a title, been diligent in the pursuit of it themselves, they might, perhaps, have obtained one from the United States.

This was not a fictitious but an actual survey, made as early as the year 1796, by a regular officer, for one owning the warrants on which the entry purports to be made, and having, at the time, full power to give complete validity both to the entry and survey. No circumstance attended them which could enable a purchaser to detect the latent defect. The survey, having every appearance of fairness and validity given to it by the regular officers of the government, is sold, at least as early as the year 1796, to persons who take possession of it, and have retained possession ever since. Why should not the proviso in the act of congress apply to the case? The words taken literally, certainly apply to it: "No location shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed." Had a patent been previously issued on this very survey, this contest could never have arisen. Does the language of the clause furnish any distinction between the patent and the survey? If it be a survey there is none. Lands surveyed are as completely withdrawn, as lands patented from subsequent location.

It cannot be said, that the prohibition was intended only for valid and regular surveys. They did not require legislative aid. It was known that the military district abounded with defective entries and surveys, which might be defeated by entries made in more quiet times, with better knowledge of the requisites of law. This clause was introduced for their protection. It was, most truly, an enactment of repose. A survey made by the proper officer, professing to be made on real warrants, bearing upon its face every mark of regularity and validity, presented a barrier to the approach of the location, which he was not permitted to pass, which he was not at liberty to examine. Had the survey been made on land not previously located, it would have been as destitute of validity as it is now supposed to be. Yet it is admitted that though it should not cover one foot of the location, the land surveyed could not be appropriated by a subsequent locator. The illegality of the survey would not have been examinable by him.

We cannot draw the distinction between such a case and this

Congress does not appear to have drawn it. They are both surveys made by the regular officers on military warrants.

It may be that the defendants may never be able to perfect their title. The land may be yet subject to the disposition of congress. It is enough for the present case to say, that, as we understand *the act of congress, it was not liable to location [*639] when the plaintiff's entry was made.

We have not noticed the testimony of the principal surveyor, because we do not think it affects the case. The word "error" was written on the face of the plot, we know not when; certainly after it was recorded, and after the certificate exhibited by the defendant at the trial had been given. It manifests his opinion that he acted improperly in admitting the survey to record, but that opinion cannot affect the case. The great original impropriety was in omitting to require that the previous entries, made in the name of Massie, should be withdrawn expressly when this entry was made.

This case is not, we think, like Taylor's Lessee *v.* Meyers, reported in 7 W. 23. In that case, the owner had openly abandoned his location and survey, and had placed his warrant on other land. In such case, the land was universally considered as returning to the mass of vacant land, and becoming, like other vacant land, subject to appropriation. A person, having no interest in the original survey, attempted to set it up against a subsequent locator, under the proviso in the act of congress which has been stated. The court said, "the proviso of that act, which annuls all locations made on lands previously surveyed, applies to subsisting surveys; to those in which an interest is claimed, not to those which have been abandoned, and in which no person has an interest." This survey has not been abandoned by any person having title to it, and the defendants still have an interest in it.

We think there is no error in the decree, and that it ought to be affirmed.

6 P. 666; 12 P. 264. 7 H. 262.

ROBERT BARRY, Appellant, *v.* GRIFFITH COOMBE, Appellee.

1 P. 640.

An item inserted in an account stated and settled, in the handwriting of the vendor, and signed by the vendee, in the words and figures following: "By my purchase of your half E. B. Wharf and premises, this day agreed on between us, $7,578.63," is a sufficient memorandum within the statute of frauds, and parol evidence is admissible to fill up the initials.

If the vendee under such a contract, gives notice he will not be bound by it, if the vendor does not pay the balance due on the account, and the vendor does not adopt the alternative tendered to him, the contract is not at an end.

THE case is stated in the opinion of the court. The letter alluded to, near the close of the opinion, is as follows:—

Washington City, March 26, 1822.

Mr. ROBERT BARRY:—

[*643] *SIR: It is now time that I should have your final answer, whether you will execute the contract made between us in presence of Mr. Carroll, for the conveyance of your moiety of the house, wharf, and premises on the eastern branch, and for payment and security of the balance due me in money. For this purpose, I have authorized Mr. John P. Ingle to call on you in my name, and receive your conveyance, a form of which he will present you, which you will please execute, and acknowledge in due form, so as to make it effectual here. Please also pay to Mr. Ingle the instalment of $500, due in September last, with interest from 27th September, 1820. Please also to execute and deliver to Mr. Ingle your two notes for the other instalments, drafts of which he will present you.

I also require of you the surrender of J. D. Barry's draft, indorsed by me for $1,000, which had been discounted in the Bank of Washington, and which you promised to take up and release me from. I must notify you, that if you persist in refusing to comply with the terms of your contract, according to your pledged faith in presence of the respectable witness above mentioned, I shall hold you accountable in money, for the whole balance due me according to our settlement, and shall merely hold the house, wharf, &c., which you were to have conveyed to me, as collateral security for the entire balance ascertained by that settlement, and for the expenses since laid out in repairs and improvements of the same, under the faith of your contract.

Respectfully, your obedient servant,

GRIFFITH COOMBS.

Coxe and *Worthington*, for the appellant.

Jones, for the appellee.

[*647] JOHNSON J., delivered the opinion of the court.

This appeal brings up for revision a decree of the circuit court of this district, by which this appellant has been required to execute, specifically, an agreement for the sale of land. The bill sets up a certain written instrument as a sufficient memorandum in writing; but not relying solely on that, goes on to make out one of those cases in which a court of equity exercises this branch of its

jurisdiction in order that the statute of frauds may not be made a cloak for fraud; that is, a case of performance on the part of the complainant.

This has caused the question on the right to relief, in a case within the provisions of the statute, to be mixed up with a great deal of extraneous matter, which need not have been set out, had the claim to relief been confined to the one ground alone.

The memorandum set up is in the form of a stated account, wholly in the handwriting of the appellant, Barry, the defendant below, and acknowledged to be a copy made by him of another, also made out in his handwriting, actually signed by Coombe, the appellee, and now in the hands of Barry. So that Barry's name is in the caption, if it may be so called, and Coombe's, at the foot of the memorandum. The item of the account which relates to the bargain or agreement for the sale of the land, is in these words, letters, and figures:—

"By my purchase of your ½ E. B. wharf and premises, this day, as agreed on between us;" and the credit is carried out in figures, $7,578.63, and deducted from the amount charged to Barry.

* Then follows this memorandum: "Balance due G. [* 648] Coombe fifteen hundred dollars, payable in one, two, and three years, with interest. G. Coombe."

The defence set up in the answer is, that the transaction was not final; that it amounted to nothing more than a treaty in progress; that, as far as it proceeded, it was obtained by false and fraudulent suggestions on the part of complainant; and that the name of defendant was signed, if signed at all, only to state an account, not to acknowledge a contract; and the answer concludes with submitting to the court whether it be "an agreement, such as is required by law and equity, to compel the defendant to make the sale and conveyance claimed and prayed for by complainant."

It is under these words alone that the protection of the statute of frauds is set up by the defendant. But in the view which this court will take of this subject, it is unnecessary to inquire whether the case required or admitted that it should be more formally pleaded, since we will dispose of the cause under the admission that he has entitled himself, by his answer, to the full benefit of the statute, if the facts of the case would maintain the defence.

And first, it is obvious that it would be idle to consider the form and effect of the instrument, if the treaty was never brought to a conclusion. On this fact the answer has put the complainant upon proof, and two witnesses have been examined to the point. Mr.

Pleasanton, the first witness, swears, that in the year 1820 the defendant showed him a statement of accounts which he believes was a copy of one exhibited by the complainant, and informed him that he had made a settlement of accounts with complainant, that the account so shown exhibited a balance against the defendant of $500 or $1,500, that it was in Barry's own handwriting, and that he stated, as an inducement to make it, that Coombe had made a sacrifice to obtain it.

The account so shown to Mr. Pleasanton could have been no other than the original of that which Coombe has exhibited; and the facts to which this witness testifies are strongly indicative of a final transaction.

The next witness, Mr. Carroll, is still more positive. He was present at the transaction; and, as he testifies, at the request of both parties, became the depository of several documents relating to it; and on the subject of the conclusive character of the transaction his language is, "that he understood the settlement to be final and absolute."

But there were other facts to which Mr. Carroll was examined; and it is argued that his testimony as to those facts goes to prove that he was mistaken in the view which he took [*649] *of the transactions; that they go to prove that there was something yet to be done before the agreement should be closed. Coombe, it seems, insisted that Barry should give his note for the balance stated and a deed for the property, before he left Washington. This, Barry resisted, and finally left Washington without doing either, and returned to his home at Baltimore.

It cannot be denied that this does conduce to prove an unfinished treaty, but the inference is repelled by various considerations.

And first, preparing the deed might require time; his business may have pressed for his return home, or he may have wished his own counsel or scrivener to draw up the deed.

2. As to the notes, giving them made no part of the agreement reduced to writing; the balance stated, was to have been paid in one, two, and three years, but it does not express that notes are to be given for it, and he may have had his reasons for declining to give his notes, or for taking advice upon it. If there should prove to be errors in the stated accounts, upon more deliberate examination, these errors might more conveniently have been adjusted upon the stated balance than upon notes, which might have found their way into several hands, and thus have multiplied litigation.

3. It does not appear from Mr. Carroll's testimony, that Barry refused generally to give either deed or notes, but only to give

them before he went to Baltimore; on the contrary, he appears to have resented Coombe's seeming to act upon a doubt that he would then execute and send them, and to this Mr. Carroll bears positive testimony when he says, "that he understood that the notes and deed were as certainly to be sent on from Baltimore, as if executed on that day."

But what is conclusive in this part of the cause is, that the transaction is followed up by an act, on the part of Barry, which no honest man could have done, otherwise than in the supposition that it was a finished transaction. It appears that Coombe, together with Mr. Carroll, and Mr. Rice, held a mortgage of a quantity of leather to the value of $7,000, given to secure to them certain sums advanced on behalf of one James D. Barry; that the defendant, Robert Barry, had assumed the debts of James D. Barry, and thereby acquired a resulting use, or equity of redemption, in this leather. That the sum for which Coombe held his lien on the leather, to wit, $4,209, was one of the items of the account in the exhibit upon which the complainant relies to obtain a decree for specific performance. But as a balance of $1,500 still remained due to Coombe upon the stated account, the leather was still pledged to him for that amount. This interest Coombe was induced to release to Barry, and which he accordingly did, by an indorsement upon the
* instrument of writing by which the lien was created. [* 650]
And Mr. Carroll testifies "that the defendant did receive,
at the tanyard in Washington, all the leather mentioned in the bill of sale, in consequence of complainant's release."

It is true an attempt was afterwards made in this suit to arrest the leather in the hands of Barry, but it was not on the ground that the treaty was *in fieri*, or the release not final; but to subject the leather to the debt, which would be due to the complainant, if he could not obtain the specific execution of the sale of the wharf, as well as the acknowledged balance. It is obvious, then, that in reducing the leather into possession, Mr. Barry must either have acted fairly, on the idea of a finished transaction, or unfairly, by entering upon the fruition by a fraud practised to obtain the release.

We will consider him as having acted fairly upon the ground of a treaty final and concluded, to be carried into execution according to its terms. But the statute of frauds, in Maryland, requires written evidence of the contract, or a court cannot decree performance. Is this such written evidence of a "contract or sale of lands" as satisfies the exigency of that statute? The words of the statute are, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the

party, to be charged therewith, or by some other person, by him thereunto lawfully authorized."

A note or memorandum in writing of the agreement, therefore, is sufficient, and there is no question that in order to obtain a specific performance in equity, the note in writing must be sufficient to maintain an action at law. The form is not regarded, nor the place of signature, provided it be in the handwriting of the party or his agent, and furnish evidence of a complete and practicable agreement. A court of equity will supply no more than the ordinary incidents to such an agreement; such as the ingredients of a complete transfer, usual covenants, &c.

At first view this would seem to be an anomalous case, but it is only necessary to reduce it to its elements in order to discover that it is one known to the adjudications of courts of equity on this statute. As to the balance stated, it is final and conclusive between these parties, and *insimul computassent* might be maintained upon it, by Coombe, for the amount. And in an action by him, going to claim the whole amount charged to Barry, it would be good evidence in the hands of Barry, to reduce Coombe's demand down to the balance stated.

It is, then, equivalent to a mutual and reciprocal receipt between these parties; on the one hand, Coombe signs a receipt for
[*651] the price of the premises in controversy, in account * with Barry, and Barry, on the other, signs a receipt to Coombe, acknowledging that he has received the price stipulated, in full of the purchase-money of the same.

This is the real purport and effect of the writing in evidence, and had the instrument, signed by the parties, been expressed in these terms, there could not have been a doubt of its sufficiency, 12 Ves. Jr. 466; 9 Ves. Jr. 234. But it is argued that this was not the intent with which the writing was concocted. That it was to state an account, and not to note an agreement for the sale of property, that it was drawn up and signed. An examination of the cases on this subject will show that courts of equity are not particular with regard to the direct and immediate purpose for which the written evidence of a contract was created. It is written evidence which the statute requires, and a note or letter, and even, in one case, a letter, the object of which was to annul the contract on a ground really not unreasonable, 1 Atk. 12; 1 Sch. & Lef. 22, has been held to bring a case within the provisions of the statute. But, in the present instance, although not the sole object of creating the instrument, it really was an object, and an important one, inasmuch as the balance of account, the immediate object of the stated account, mainly depended upon

the item for the sale of these premises. It could not be stated without acknowledging that the one had agreed to sell, and the other to purchase, these premises at a stated price. On this part of the cause the case of Stokes *v.* Moore has been cited, 1 Coxe, 222, and insisted on as furnishing an argument against the sufficiency of the signature of Barry in this cause. But in the case of Stokes *v.* Moore, it must be observed that both the judges who sat on that cause admit that this was not the principal question in the cause, and it was decided upon the ground that the memorandum was proved not to express the entire agreement between the parties. But, if considered as authority in this point, it is only necessary to advert to the ground upon which the opinion is expressed, "that the name there was not a sufficient signature under the statute," in order to discover that it does not impugn the opinion entertained by this court in the present cause. The rule there laid down is, "that the signature is to have the effect of giving authenticity to the whole instrument;" and in this instance, we hold it to be in its proper place for that purpose. If so, the court there further observes, "that it does not signify much in what part of the instrument it is to be found." It remains to examine whether the memorandum is sufficiently full and explicit to admit of a decree for specific performance. The words are: "By my purchase of your ½ E. B. wharf and premises, this day, as agreed on between us, $7,578.63." Brief as it is, this memorandum contains a condensed summary of all the *essentials to a [*652] complete contract. By the use of the present tense, it speaks of a thing final and concluded. By reference to the date at the head of the account, the use of the words "this day" gives a date to the transaction. By the use of the pronouns *your* and *us*, the parties are distinctly introduced. By carrying out the price, the consideration is expressed with absolute precision, and by deducting it from the sum acknowledged due by Barry, the receipt of the consideration is acknowledged; nor is there a single ingredient of a complete contract deficient, unless the description of the property contracted for be insufficient. If that description be fatally ambiguous, it is certainly a sufficient ground to refuse relief. The ambiguity here arises from the use of the capital letters E. B. in the description of the premises; and if those letters stood alone, and unconnected with any thing that could give them a definitive signification, there would be much reason to doubt whether the defect would be curable. The words are: "Your ½ E. B. wharf and premises;" and it is argued that this is one of those ambiguities generally designated by the epithet patent, and as such admitting of no explanation from extrinsic evidence.

Sir Francis Bacon, in his elements of common law, *Regula*, 23, is the author usually referred to on this distribution of ambiguities into patent and latent; the former appearing on the face of the instrument, and not to be removed by extrinsic evidence, but only, in the language of the author, "to be holpen by construction or election;" the latter raised by reference to extrinsic circumstances, and remediable by the same means. It would perhaps be a more convenient, and certainly a more intelligible distribution of the doctrine on this subject, if the cases were divided into positive, relative, and mixed; the positive corresponding to the patent, and the relative to the latent ambiguities of the authors who treat of the subject. The mixed would consist of those cases in which, although the ambiguity is suggested on the face of the instrument, the face of the instrument also suggests the medium by which the ambiguity may be removed.

The facts of this case will bring it either within the second or third class; within the second, because, for any thing that appears on the face of the instrument, E. B. wharf may be as definitive a description of locality as F street, and then the ambiguity could only arise if it be shown that the bargainor had more than one house in F street, like the two manors of sale, put by several authors.

Perhaps this case belongs more properly to the third class, since the description suggests several circumstances of identity, by reference to which the premises in question are distinguishable from all [*653] others; first, it is a wharf; secondly, a wharf *the property of Barry; thirdly, a wharf of which he owns a moiety; and connected with these descriptive circumstances, the letters E. B. became in fact the initials of the name of a place; and the case is analogous to that of a will, in which the devisee is designated as my son A, my nephew B C, or my uncle D E, in which the circumstance of relationship will let in evidence to fill up the names designated by the initials.

In fact, the cases on this point have gone much further, and, without committing ourselves on the correctness of the following two, it will be found, by referring to them, such evidence has been let in to supply names, in cases where the identification was by no means as circumstantial as the present.

In the case of Price *v.* Page, 4 Ves. Jr., 680, the entire Christian name was supplied on parol evidence, without any initial, Price, the son of Price, being the only designation. In the case of Abbot *v.* Massie, 3 Ves. Jr. 148, the devise was to A. G. and Mrs. G., and evidence ordered to be received to identify the legatees.

If ever extrinsic evidence may be admitted to carry out the initials of a name, it is impossible that a case can occur to furnish evidence

more full or unexceptionable in its character than the present. The bill alleges that the letters E. B. mean Eastern Branch; and the defendant not only admits in his answer that the treaty had relation to his moiety of a wharf and premises on the Eastern Branch of the Potomac, but voluntarily, although *altero intuitu*, introduces a letter from himself to complainant, in which it is explicitly acknowledged. "Having agreed to sell you my individual half interest in the Eastern Branch wharf and premises," is his language in the letter. Besides which, the original deed is spread upon the record; by which it appears that the defendant held a moiety, as tenant in common with the plaintiff, of a wharf and premises on the Eastern Branch of the Potomac River, which is well known in common parlance as the Eastern Branch, without the addition of Potomac or river. We are, therefore, of opinion that the ambiguity is fully removed, and legally, since it is by reference to a medium of explanation suggested on the face of the memorandum; and on evidence which, while it neither adds to, detracts from, nor varies the note in writing, supplies every exigency of the statute of frauds.

The only remaining question arises on the effects of Coombe's letter of the 26th of March, 1822, which, the defendant insists, amounted to a relinquishment of the contract of sale, and this appears to some of the court to present the greatest difficulty in the cause. For it cannot be denied that the letter is not confined in its import to a demand of a fulfilment of the contract. It does not intimate an intention to enforce the contract; * but, on [* 654] the contrary, concludes with the declaration, that, if Barry does not comply with this contract on his part, the complainant will hold himself exonerated, and will resort to his original money contract, as it stood prior to their entering into the contract for the sale of the premises.

Nothing, therefore, but the equivocal conduct of Barry on the receipt of that letter, as proved in the deposition of Ingle, deprives him of the benefit of this defence. To have availed himself of it, he should have adopted the alternative offered him; and, as the only unequivocal proof of it, should have tendered to Coombe the amount justly due to him, after extracting that item from the account. This he did not do; and it was too late after the bill filed to claim the benefit of a right thus gone by, at least without paying unto Coombe the amount which would have been due to Coombe upon a mutual relinquishment of the bargain.

As to the ground of misrepresentation and fraudulent concealment, we have not thought it necessary to say more than that there is not the least evidence to support the charge set up in the answer.

Nor is it necessary to examine the case on the ground of part performance; since this court is fully satisfied on the sufficiency of the memorandum in writing to sustain the decree, so far as it requires Barry to make title to the moiety of the wharf, lot, and premises.

With regard to that part of the decree which relates to the payment of the balance of the stated account, and perpetuates the injunction not to remove certain property beyond the jurisdiction of the court until that balance be paid, we are induced to consider all objections to be waived.

Yet, we mean not to express any doubts of its correctness; since the defendant has nowhere put his defence upon the ground of the remedy at law, but, on the contrary, by his answer, he impeaches the conclusiveness of the stated account, and raises an issue in equity upon the fairness and correctness of several items, which, if expunged, would leave a balance in his favor.

This defence he has failed to sustain by proof; and the court, on that ground alone, independent of its connection with the principal subject of the bill, might legally decree payment of the stated balance, and the means of enforcing payment.

Decree affirmed, with costs, and cause remitted for final proceedings.

ALLISON ROSS, Plaintiff in Error, *v.* JOHN DOE, on the demise of ADAM BARLAND and others.

1 P. 655.

If both parties assert title under an act of congress, this court has jurisdiction, under the 25th section of the Judiciary Act. (1 Stats. at Large, 85.)

If it be the established practice of the courts of a State, in an action of ejectment, to look behind the patent and examine into the validity of the progressive stages of the title, this court, on a writ of error under the 25th section of the Judiciary Act, cannot examine the correctness of that practice.

A donation certificate, under the act of March 3, 1803, (2 Stats. at Large, 229,) gives a title superior to that acquired by a purchase at a public land sale.

No particular form of such certificate is required; it is sufficient if it shows the occupancy required by the act, and what land granted.

The commissioners under the act of 1803 were empowered to hear evidence, as to the time of the evacuation by the Spanish troops, and to decide on the fact.

THE case is stated in the opinion of the court.

Wirt (attorney-general) for the plaintiff in error.

Coxe, for the defendants.

[*662] * TRIMBLE, J., delivered the opinion of the court.

This was an action of ejectment, originally instituted in a circuit court of the State of Mississippi.

Upon the trial of the cause, in the court of original jurisdiction, the defendant excepted to the opinion of the court, in overruling instructions moved on his part to be given to the jury, and also to the instructions given by the court at the trial of the cause.

In the bill of exceptions tendered by the plaintiff in error in the court below are inserted the titles of the parties to the land in controversy, and the facts upon which the questions of law arise, which were decided by the court. A verdict and judgment were rendered against the defendant, from which he appealed to the supreme court of the State, being the highest court of law therein, where the judgment was affirmed; and the case is now brought before this court, by writ of error to the supreme court of the State.

The material facts of the case are the following: The lessors of the plaintiffs in the action of ejectment claimed the land in controversy, under and by virtue of a patent from the United States, dated the 13th day of October, 1820, which was given in evidence. This patent emanated upon a certificate of the board of commissioners west of Pearl River, organized under the provisions of the act of congress of the 3d of March, 1803, entitled "An act regulating the grants of land, and providing * for the disposal of [* 663] the lands of the United States south of the State of Tennessee;" which certificate was also given in evidence, and bears date the 13th day of February, 1807. The important parts of the certificate are in the following words, to wit: Joseph White claims a tract of six hundred and forty acres of land, situated in Claiborne county, on the waters of Bayou Pierre, by virtue of the occupancy of the claimant on and before the 30th day of March, in the year one thousand seven hundred and ninety-eight. We certify that the said Joseph White is entitled to a patent therefor from the United States, by virtue of the recited act."

The defendant claimed and held possession of the land under and by virtue of a patent from the United States, dated the 12th day of August, 1819, for 553 acres of land. This patent is founded upon a purchase at the general sale of the lands of the United States, at Washington, Mississippi, under the authority of the before recited act of congress.

Upon this state of facts, the counsel for the defendant moved the court to instruct the jury: "That in such a case the older patent of the defendant under which he claimed possession, should prevail in the action of ejectment in a court of law, against the said junior patent of the plaintiff, although the said junior patent of the plaintiff

Nor is it necessary to examine the case on the ground of part performance; since this court is fully satisfied on the sufficiency of the memorandum in writing to sustain the decree, so far as it requires Barry to make title to the moiety of the wharf, lot, and premises.

With regard to that part of the decree which relates to the payment of the balance of the stated account, and perpetuates the injunction not to remove certain property beyond the jurisdiction of the court until that balance be paid, we are induced to consider all objections to be waived.

Yet, we mean not to express any doubts of its correctness; since the defendant has nowhere put his defence upon the ground of the remedy at law, but, on the contrary, by his answer, he impeaches the conclusiveness of the stated account, and raises an issue in equity upon the fairness and correctness of several items, which, if expunged, would leave a balance in his favor.

This defence he has failed to sustain by proof; and the court, on that ground alone, independent of its connection with the principal subject of the bill, might legally decree payment of the stated balance, and the means of enforcing payment.

Decree affirmed, with costs, and cause remitted for final proceedings.

ALLISON ROSS, Plaintiff in Error, *v.* JOHN DOE, on the demise of ADAM BARLAND and others.

1 P. 655.

If both parties assert title under an act of congress, this court has jurisdiction, under the 25th section of the Judiciary Act. (1 Stats. at Large, 85.)

If it be the established practice of the courts of a State, in an action of ejectment, to look behind the patent and examine into the validity of the progressive stages of the title, this court, on a writ of error under the 25th section of the Judiciary Act, cannot examine the correctness of that practice.

A donation certificate, under the act of March 3, 1803, (2 Stats. at Large, 229,) gives a title superior to that acquired by a purchase at a public land sale.

No particular form of such certificate is required; it is sufficient if it shows the occupancy required by the act, and what land granted.

The commissioners under the act of 1803 were empowered to hear evidence, as to the time of the evacuation by the Spanish troops, and to decide on the fact.

THE case is stated in the opinion of the court.

Wirt (attorney-general) for the plaintiff in error.

Coxe, for the defendants.

[*662] *TRIMBLE, J., delivered the opinion of the court.

This was an action of ejectment, originally instituted in a circuit court of the State of Mississippi.

Upon the trial of the cause, in the court of original jurisdiction, the defendant excepted to the opinion of the court, in overruling instructions moved on his part to be given to the jury, and also to the instructions given by the court at the trial of the cause.

In the bill of exceptions tendered by the plaintiff in error in the court below are inserted the titles of the parties to the land in controversy, and the facts upon which the questions of law arise, which were decided by the court. A verdict and judgment were rendered against the defendant, from which he appealed to the supreme court of the State, being the highest court of law therein, where the judgment was affirmed; and the case is now brought before this court, by writ of error to the supreme court of the State.

The material facts of the case are the following: The lessors of the plaintiffs in the action of ejectment claimed the land in controversy, under and by virtue of a patent from the United States, dated the 13th day of October, 1820, which was given in evidence. This patent emanated upon a certificate of the board of commissioners west of Pearl River, organized under the provisions of the act of congress of the 3d of March, 1803, entitled "An act regulating the grants of land, and providing * for the disposal of [* 663] the lands of the United States south of the State of Tennessee;" which certificate was also given in evidence, and bears date the 13th day of February, 1807. The important parts of the certificate are in the following words, to wit: Joseph White claims a tract of six hundred and forty acres of land, situated in Claiborne county, on the waters of Bayou Pierre, by virtue of the occupancy of the claimant on and before the 30th day of March, in the year one thousand seven hundred and ninety-eight. We certify that the said Joseph White is entitled to a patent therefor from the United States, by virtue of the recited act."

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Upon this state of facts, the counsel for the defendant moved the court to instruct the jury: "That in such a case the older patent of the defendant under which he claimed possession, should prevail in the action of ejectment in a court of law, against the said junior patent of the plaintiff, although the said junior patent of the plaintiff

emanated upon a prior certificate of the board of commissioners west of Pearl River; but the court refused to give such instructions in point of law to the jury, but, on the contrary, instructed them that the junior patent of the said plaintiff, emanating upon a certificate of a donation claim prior in date to the patent under which the defendant claims, would overreach the patent of the defendant, and in point of law should prevail against such prior patent of the defendant."

These opinions having been affirmed upon appeal to the supreme court of the State, the object of this writ of error is to have them reviewed in this court.

It has been objected that this court has not jurisdiction of the case. By the 2d section of the 3d article of the constitution it is declared: "That the judicial power shall extend to all cases arising under this constitution, the laws of the United States, and treaties made or to be made under their authority, &c." By the 25th section of the Judiciary Act of 1789, made in pursuance of this provision of the constitution, it is enacted: "That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the construction of any statute of the United States, and the decision is against the title or right, &c., specially set up or claimed by either party, &c., under such statute, &c., may be reëxamined and [* 664] reversed *or affirmed by the supreme court of the United States upon a writ of error."

In this case, the titles of both parties are derived under an act of congress; the construction of the statute is drawn directly in question; and the decision of the highest court of law of the State is against title and right of the party specially set up in his defence under the statute. This case is not distinguishable from the case of Matthews *v.* Zane, 4 C. 382, in which the jurisdiction of this court was maintained.

For the plaintiff in error, it is argued that the state court erred in deciding that the elder grant should not prevail in the action of ejectment.

It is undoubtedly true that, upon common law principles, the legal title should prevail in the action of ejectment, upon the same grounds that the legal right prevails in other actions in courts of law. It is so held in those States in which the principles of the common law are carried into full effect, and the course of proceeding in the action of ejectment are according to those principles. In the States where these principles prevail, it is held that in a trial at law the courts will not look behind or beyond a grant, to the rights upon which it is

founded; nor examine the progressive stages of the title antecedent to the grant.

But in other States, the courts of law proceed upon other principles. In the action of ejectment, they look beyond the grant, and examine the progressive stages of the title from its incipient state, whether by warrant, survey, entry, or certificate, until its final consummation by grant; and if found regular and according to law in these progressive stages, the grant is held to relate back to the inception of the right, and to have dignity accordingly.

This latter course, seems to be the one adopted and pursued by the courts of Mississippi. It is enough for us to say, that in so doing, and in applying their peculiar mode of proceeding to titles derived through and under the laws of the United States, they violated no provisions of any statute of the United States.

The important question in the case is this: In applying its own principles and practice in the action of ejectment, as might well be done to this case, has this court misconstrued the act of congress, in deciding that the grant of the plaintiff, emanating upon the donation certificate of the board of commissioners, west of Pearl River, set forth in the record, would overreach the defendant's grant, and should prevail against it in the action of ejectment?

This draws in question the construction of the act of congress of 1803, and gives this court jurisdiction of the case. It is
*well known, that prior to the treaty of San Lorenzo, of [*665]
the 27th of October, 1795,[1] controversies had long existed between the United States and his Catholic Majesty, on the subject of the boundaries which separated the United States and the Spanish provinces of East and West Florida. The second article of that treaty declares: "That the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the Mississippi River, at the northernmost part of the thirty-first degree of latitude north of the equator, which, from thence, shall be drawn due east to the middle of the River Appalachicola," &c. And it is agreed, that if there should be any troops, garrisons, or settlements of either party, in the territory of the other, according to the above-mentioned boundaries, they should be withdrawn from the said territory within the term of six months after the ratification of this treaty, or sooner if it be possible.

It is matter of public history, that there were Spanish troops, garrisons, and settlements north of this boundary, and within the territory

[1] 8 Stats. at Large, 138.

of the United States, which were not withdrawn till long after the time stipulated by the treaty.

By the 2d section of the before-recited act of congress, of the 3d of March, 1803, it is enacted: "That to every person, or to the legal representative or representatives of every person, who, either being the head of a family or of twenty-one years of age, did, on that day of the year 1797, when the Mississippi territory was finally evacuated by the Spanish troops, actually inhabit and cultivate a tract of land in the said territory, &c., the said tract of land thus inhabited and cultivated, shall be granted; provided, however, that not more than one tract shall be thus granted to any one person, and the same shall not contain more than 640 acres; and provided that this donation shall not be made to any person who claims any other tract of land in the said territory, by virtue of any British or Spanish grant or order of survey."

The 6th section of the act provides for the establishment of two boards of commissioners, one east and the other west of Pearl River, in said territory: "for the purpose of ascertaining the rights of persons claiming the benefit of the articles of agreement and cession between the United States and the State of Georgia, or of the first three sections of this act. And each board, or a majority of each board, shall, in their respective districts, have power to hear and decide in a summary manner all matters respecting such claims; also to administer oaths and examine witnesses, and such other testimony as may be adduced, and to determine thereon according to justice and equity; which determination, so far as relates [* 666] to any rights *derived from the articles of agreement aforesaid, or from the first three sections of this act, shall be final."

The 11th section provides: "That the lands for which certificates of any description whatsoever shall have been granted by the commissioners, in pursuance of the provisions of this act, shall, as soon as may be, be surveyed. And the said surveyor shall cause all the other lands of the United States in the Mississippi territory to be surveyed."

And the 12th section provides that all the lands aforesaid, not otherwise disposed of or excepted, by virtue of the provisions of the preceding sections of this act, shall (with certain other reservations and exceptions) be offered for sale.

As such lands only were authorized to be offered for sale as had not been appropriated by the previous sections of the law, and certificates granted by the commissioners in pursuance thereof, it follows, incontestably, that the right of the plaintiff in the ejectment, derived from a donation certificate, is superior to that of the defend-

ant, derived from a purchase at the sales, unless there is some fatal infirmity in the certificate which renders it void. This has not been contested.

But it is objected to this certificate:—

1. That it is not a donation certificate.

2. That it is not sufficiently precise, and does not aver all the facts necessary to authorize the commissioners to grant a certificate.

3. The period of occupancy is alleged to be March 30, 1798.

The answer to the first objection is, that the certificate is granted for 640 acres of land, the precise quantity for which a donation certificate was authorized.

This is sufficient evidence of the intention of the board of commissioners to grant a donation certificate. The period of occupancy, too, fits the case of a donation certificate or none, and, if necessary, fortifies the conclusion of its being granted as a donation certificate.

To the second objection, it may be answered that the law requires no precise form in the certificate. It is sufficient, if the proofs be exhibited to the board of commissioners, to satisfy them of the facts entitling the party to the certificate. The facts need not be spread upon the record. It is sufficient if the consideration, to wit, the occupancy, and the quantity granted, appear.

Nothing more is necessary to certify to the government of the party's right, or to enable him, after it is surveyed by the proper officer, to obtain a patent.

The objection that the occupancy is stated to be on the 30th of March, 1798, produces more difficulty.

* The language of the second section of the act of con- [* 667]
gress, authorizing these donation claims, is, that the persons who, on that day of the year 1797, when the Mississippi territory was finally evacuated by the Spanish troops, &c.

This language is very peculiar, and shows plainly that, although congress, at the time of passing the law, was certain of the fact of evacuation by the Spanish troops, that body was not informed of the precise time when the evacuation took place.

The law was intended to confer a bounty on a numerous class of individuals; and, in construing the ambiguous words of the section, it is the duty of the court to adopt that construction which will best effect the liberal intentions of the legislature.

To interpret this section literally, that land should be granted to those who, on the same day of the year 1797, occupied a tract of land, provided the Spanish troops finally evacuated the territory, and on that very day of that very year 1797, would totally defeat the operation of the law, and the bounty intended by it, if it should have

happened that the final evacuation of the territory, by the Spanish troops, took place on the first day of January, 1798, or on any subsequent day.

If an individual had inhabited and cultivated a tract of land every day in the year 1797, still, according to the letter of this section, he was not entitled to the bounty of the government, because the Spanish troops had not evacuated the territory any day of that year, but some day of the next year; and, although the party continued to occupy the land until the day of the actual evacuation, still, he could not be entitled, according to the letter of the act, because that day was not any day of the year 1797.

This could not be the intention of congress. The country had been settled during the conflict on the subject of boundaries, between Spain and the United States, by the citizens and subjects of both governments. It was a weak and exposed frontier of the United States. The manifest general intent of the act of congress is to confer a bounty upon the inhabitants and cultivators of the soil, who elected to remain in the country at the time of the actual evacuation by the Spanish troops. In this view of the subject, the time of the actual evacuation was very important, but whether it was on some day in the year 1797 or 1798, was comparatively unimportant.

If the fact be supposed, and it must be supposed for the sake of the argument, that the actual evacuation took place on the 30th of March, 1791, then something must be rejected in the construction and interpretation of the act of congress to make the pro-
[* 668] visions of the law effectual. Either the words, * "of the year 1797," must be rejected as inconsistent with the main scope and general intent of the law, or the claims to donations of all the inhabitants and cultivators, west of Pearl River, must be defeated. This would but defeat the manifest general intent of the law.

It was said at the bar that all the donation certificates, west of the Pearl River, express to be for occupancy on the 30th day of March, 1798, and a certificate from the commissioners of the general land-office, to that effect, was produced. It is not necessary to decide whether we can or cannot notice this certificate as evidence of the fact that the evacuation took place on that day, or as evidence of the construction given by the board of commissioners, west of Pearl River. It is sufficient if they were authorized to give such construction to the act in the event supposed, that the event happened; or, in other words, that the actual evacuation took place on the 30th of March, 1798, as supposed in the argument; and that the construction of the 2d section of the act of congress, which we are disposed to adopt, is the true construction in the estimation of congress itself,

we think may fairly be inferred from the act of congress of the 21st of April, 1806.[1] The 4th section of that act provides that, "wherever it shall appear, to the satisfaction of the register and the receiver of the district east of Pearl River, that the settlement and occupancy, by virtue of which a preëmption certificate had been granted by the commissioners, had been made and taken place prior to the 30th of March, 1798, they shall be authorized to grant to the party a donation certifiate, in lieu of such preëmption."

It appears from this section that the commissioners east of Pearl River had adopted the construction of the act of 1803, contended for by the plaintiff in error, and that, instead of granting donation certificates to the inhabitants and settlers, down to the period of the 30th of March, 1798, under the 2d section of the act, they had granted preëmption certificates under the provisions of the 3d section. Congress treat this as a mistaken construction of the law, by directing donation certificates to be made out in lieu of the preëmption certificates.

The act of 1803 puts the settlers east and west of Pearl River on precisely the same footing; and it is inconceivable that congress could have any motive for giving those east of Pearl River any preference by the act of 1806, or that the act could have any other object than to continue upon the same footing the settlers east and west of Pearl River.

The certificate granted in the case before us is sufficient evidence that the commisssioners west of Pearl River adopted a more liberal construction, such as we think they were warranted *in adopting, and such as we think is manifestly sanctioned [*669] by congress in the act of 1806.

It is the opinion of this court that the commissioners were authorized to hear evidence as to the time of the actual evacuation of the territory by Spanish troops, and to decide upon the fact. The law gave them "power to hear and decide all matters respecting such claims, and to determine thereon according to justice and to equity," and declares their determination shall be final.

We are bound to presume that every fact necessary to warrant the certificate, in the terms of it, was proved before the commissioners; and that, consequently, it was shown to them; and the final evacuation of the territory by the Spanish troops took place on March 30, 1798.

Upon the whole, it is the unanimous opinion of this court that the supreme court of the State of Mississippi has not misconstrued the act of congress, from which the rights of the parties are derived, and that the judgment of the supreme court be affirmed.

13 P. 436, 498; 16 P. 234; 3 H. 650; 4 H. 449; 18 H. 19; 19 H. 334.

[1] 2 Stats. at Large, 400.

ANN PRAY, Executrix, J. J. MAXWELL AND GEORGE WATERS, Executors of JOHN PRAY, deceased, Appellants, *v.* GEORGE G. BELT, Trustee, and JAMES P. HEATH, *pro. ami.*

1 P. 670.

A testator having empowered his executors, his wife to have a voice as executrix, to decide finally what was his intention, in case of dispute — *Held*, that if this power was valid, it did not enable the executors to decide contrary to the plain intent of the testator, to be judged of by a court of justice, nor to decide a question in which they or either of them was interested.

A legacy being given jointly to several families, whose individual members were not ascertained by the will, all the legatees are necessary parties to a bill for payment of the legacy.

Construction of a will; legacy vested and payable from a specific fund.

THE case is stated in the opinion of the court, save that the clauses in the will in question, on which the case turned, were as follows: —

[*671] *"Item 51. Whereas I hold ten bonds, given by John J. Maxwell, payable by ten instalments, the first on the 10th of January next, and the others on the 10th of January in each year after. It is my will, and I direct that the bonds payable 10th of January, 1820, 1821, and 1822, say the first three, shall be applied in aid of the payment of my just debts, if any due, and in the payment of the legacies by me left. It is my request, that my executors do also apply all funds which I may possess at my decease, as also dividends on all my bank stock, (except that part of dividends which I have directed to go immediately to some of my legatees,) and also to apply all moneys due to me as soon as collected, and also all rents and crops of rice and cotton, first to pay any debts, and then legacies, any heretofore left, or which I may hereafter leave to be paid. It is my will, and I do direct that my executors do pay up the one half of all the cash legacies by me left to my relations, out of the first funds they can command from my estate, except those I may have directed to be paid immediately; and after they have paid the one half to my relations, thereafter it is my will that they do pay up, in equal proportions, agreeably to sums left, to all my other legatees; and be it understood, and it is my will and intention, that after they have paid the one half to my relations, that they will continue to pay them the other half in equal proportions with my other legatees; my object and intention is to place them on the same footing with my other legatees, after the payment of one half to my said relations. It is my will and request, that my executors do pay all my debts and legacies as soon as possible after my death; but be it explicitly and plainly understood, that no interest whatever is to be allowed on any legacy by me left to any one of my legatees, as in all probability the

resources and funds of my estate will be equal to the payment of my debts and legacies before the three bonds mentioned of John J. Maxwell may fall due and be collected. In case all debts and legacies can be paid before the three aforesaid bonds can be collected, then, and in that case, whatever balance may remain to be collected on the three aforesaid bonds, principal and interest, it is my will that the same shall be equally divided as collected between the following persons, share and share alike: To my executors in trust, for the use and benefit of my aunt, Turpin, my uncle's present wife; it is my intention to keep it from being subject to my uncle's debts that I leave it in trust; in case of no risk, my executors will pay it over to my aunt. My god-daughter, Mary Jane Pray Hines, wife of Lewis Hines. The children of Thomas Mann, by his present wife, as also Ann and Jane, now in New Providence. Any part
* which the children of Harriet Mann, Thomas Mann's wife, [* 672]
may be entitled to, is to be ascertained by the number she may have at the time these bonds are collected, and my executors are ready to pay over. In case all is not applied on my debts and legacies, and if Harriet hath any child after the payment, then such child to receive such proportion as the other children out of the part paid to such as she before had or has at the time the same is paid. My executors will be governed in the distribution by the number of children Harriet has on the day they are ready to make a distribution. In case of any surplus left on said bonds, the said children's parts to be paid to their legal representatives, so it is not their father; (I omitted the word Mann after the words Ann and Jane above;) and to Richard K. Heath, in trust for the benefit of Jane Heath, wife of James P. Heath, and such children as she may have when that surplus may be collected, in case of there being any."

"It is my will, and I direct that all my estate, both real and personal, shall be kept and continued together until all my just debts and legacies are paid; debts, if any, first, and as soon after as possible, to be disposed of as hereinafter directed."

"In case of accidents by fire, at any time before or after my executors pay my debts and legacies, it is my will that my wife receive the amount of insurance to aid in rebuilding; and in case of accidents by fire on lots in Nos. 6 and 7, before my debts and legacies are paid, it is my will, in such case, that my executors hold all my estate together until they can add ten thousand dollars to what may be received on insurance; and they are requested to put on fire-proof buildings on said lots to both these amounts; and if these sums are insufficient, they are authorized to raise any balance for erecting proper buildings on the credit of my wife; this balance, if any re-

quired, be it understood, is to come out of my wife's portion of my estate left her.

"In case of such an accident, if necessary, in order not to delay rebuilding, my executors will resort to a loan from the bank or banks. Whereas there is no doubt but there must be a considerable surplus fund of my estate by debts due, or crops on hand, or near made, after my executors have paid all my debts and legacies, which my wife will come in for; if my executors discover that, by such surplus, the same will not be equal to ten thousand dollars, in that case it is my will that they continue all my estate together until they can make up ten thousand dollars; and it is my request that they will, as soon as possible after raising the aforesaid sum, proceed to put up fire-proof buildings on the aforesaid lots."

"Whereas my will is lengthy, and it is possible I may have committed some error or errors, I do therefore authorize and [* 673] * empower, as fully as I could do myself, if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention: whatever they may determine, is my intention shall be final and conclusive, without any resort to a court of justice."

Berrien, for the appellants.

Key, for the appellees.

[* 676] * MARSHALL, C. J., delivered the opinion of the court.

This suit was brought in the circuit court for the district of Georgia, by George G. Belt, the trustee for Jane Heath and her children, who are infants, and by James P. Heath, husband of the said Jane, and father of her children, against the executors of John Pray, deceased, and Ann Pray, his widow, to recover a legacy bequeathed to them and others, by the said John Pray.

The executors resist the demand, on the principle that the bonds for which the suit is instituted were required to pay the debts and legacies due from the testator, and to raise the $10,000 to replace the buildings on lots 6 and 7, which were consumed by fire. They also contend, that their testator has submitted the construction of his will absolutely to their judgment, and that their decision against the claim of the legatees is final.

The circuit court established the claim of the plaintiffs, and decreed to them the proportion of the three bonds, which were estimated to be their part.

From this decree the executors have appealed to this court.

In argument, several formal objections have been taken to the decree, which will be considered. The question * on [*677] the merits depends on the construction of the will. The will is very inartificially drawn. It is in some parts rendered more confused than it would otherwise be, by a recurrence in different places to the same subject. In item 51, he says, in the first instance, that the three bonds which are the subject of controversy, "shall be applied in aid of the payment of his just debts, if any due, and in the payment of the legacies by him left." He adds: "It is my request that my executors do also apply all funds which I may possess at my decease, as also dividends on all my bank stock, (except that part of dividends which I have directed to go immediately to some of my legatees,) and also to apply all moneys due to me, as soon as collected, and also all rents and crops of rice and cotton, first to pay any debts, and then legacies," &c.

The language of this part of the will, in relation to these bonds, shows an intention to apply them to debts and legacies, if necessary; but indicates, we think, the expectation that it would not be necessary. They are to be applied in aid of the payment of his just debts, and in the payment of legacies. They are then to aid another fund. That fund is afterwards described in terms, which show it to be a large one. There is some reason to suppose, from this part of the will, that these three bonds were not comprehended in it, because the testator introduces the enunciation of its items by saying, "it is my request that my executors do also apply all funds, &c." Again, he assigns as a reason for withholding interest from his legatees, "that in all probability the resources and funds of his estate will be equal to the payment of his debts and legacies before the three bonds mentioned of John J. Maxwell may fall due and be collected."

This shows, unequivocally, the belief of the testator that these bonds would not be required for the debts and legacies. He then adds, "in case all debts and legacies can be paid before the three aforesaid bonds can be collected, then, and in that case, whatever balance may remain to be collected shall be equally divided between the following persons," &c.

This bequest does not depend on the fact that the debts and legacies should be actually paid before these three bonds were collected, but on the sufficiency of the fund for the object. Should the fund be sufficient, its application must be made; and whether made in fact or not, the right to the bonds vests in the legatees.

The testator then proceeds to say: "It is my will, and I direct that all my estate, both real and personal, shall be kept and continued ogether until all my just debts and legacies are paid."

This whole item, 51, shows the opinion that the profits [*678] of *his estate, including dividends on his stock, added to the debts actually due at the time were sufficient for the payment of debts and legacies. Yet his estate is to be kept together till they shall be paid. The profits are of course to be applied to that object. If this fund amounted before the 10th day of January, 1820, when the first bond from J. J. Maxwell fell due, to a sufficient sum for the payment of debts and legacies, the right of the legatees to the three bonds then vested. If it was not sufficient on that day, it may be doubted whether such part of the first bond as was necessary for this primary object might be brought to its aid immediately. We suppose it might. A codicil to the will is dated the 18th day of June, 1819, and the will and codicil were proved on the 27th of the succeeding month. The executors qualified in the month of December; having ascertained, they say in their answer, the adequacy of the fund provided for debts and legacies, they commenced the division of the estate.

So far as the will has been considered, it is obvious that the right of the legatees, to whom the two parts of the first three bonds due from Maxwell were bequeathed, was vested. Their right to the first bond may be more questionable. If part of the fund which was applicable in the first instance to debts and legacies, could not be made available immediately, and the first bond or any part of it was substituted for debts which could not be collected, it cannot be doubted that those debts, when collected, ought to replace the bond so substituted. The testimony in the cause does not show, with sufficient certainty, how this fact stands. It is remarkable that this first bond was applied by the executors before the 10th of January, 1820, when it became due. They state this fact in their answer. But we are decidedly of opinion, that this precipitate appropriation of the bond could not affect the rights of the parties. They must remain as they would have stood had the bond remained uncollected till it became payable.

The contest in this suit would either not have arisen, or would have been confined to the first bond, had things remained as they stood before the 10th day of January, 1820. But on that day the buildings on lots Nos. 6 and 7 were consumed by fire.

In that event, the testator had directed that his executors should, for the purpose of replacing the buildings, hold all his estate together until they can add $10,000 to what may be received on insurance. He adds: "In case of such an accident, if necessary, in order not to delay rebuilding, my executors will resort to a loan from the bank or banks." "Whereas there is no doubt but there must be a consider-

able surplus fund of my estate, by debts due or crops on hand, or near made, after my executors have paid all my [*679] debts and legacies which my wife will come in for; if my executors discover that, by such surplus, the same will not be equal to $10,000, in that case it is my will that they continue all my estate together until they can make up $10,000."

Instead of conforming to this direction of the will, instead of keeping the estate together, the executors have applied the remaining two bonds payable the 10th of January, 1821, and the 10th of January, 1822, to this object.

They say that, having commenced the delivery of the estate before this event took place, they thought themselves bound to complete it; and considered themselves in the same situation as if it had been completed before the buildings were consumed.

Suppose this opinion to be correct, ought they not also to have considered the bonds as delivered? This also was a specific legacy, and after being vested, stands, we conceive, on equal ground with other specific legacies.

These bonds do not constitute the fund on which the testator charges these $10,000, in the unlooked for event that the surplus of his estate should not be sufficient to raise it. He does not charge this sum on the principal, but on the profits of his estate; and the whole is to be kept together in order to raise it. It is obvious from the whole will, that these bonds do not constitute a part of that surplus, comprehending debts; and in this particular part of it, when he speaks of debts, it is of debts due. No one of these bonds was due at the date of the will, or of the death of the testator.

It is then, we think, apparent that the application of these bonds towards raising the sum of $10,000, was a misapplication of assets.

If the estate had really been delivered when the event occurred, the executors ought to have retained their rights upon it to satisfy this contingent claim, and we presume that the property would have been liable to it in the hands of devisees and legatees.

But the plaintiffs in error contend that, should they have misconstrued the will of their testator, still, their misconstruction binds the legatees, because the testator says: "Whereas my will is lengthy, and it is possible I may have committed some error or errors. I therefore authorize and empower, as fully as I could do myself if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases in case of any dispute or contention; whatever they determine is my intention shall be final and conclusive without any resort to a court of justice."

Clauses of this description have always received such ju-
[*680] dicial *construction as would comport with the reasonable intention of the testator.

Even when the forfeiture of the legacy has been declared to be the penalty of not conforming to the injunction of the will, courts have considered it, if the legacy be not given over, rather as an effort to effect a desired object by intimidation, than as concluding the rights of the parties. If an unreasonable use be made of the power, one not foreseen, and which could not be intended by the testator, it has been considered as a case in which the general power of courts of justice to decide on the rights of parties ought to be exercised.

This principle must be kept in view in construing the clause now under consideration.

The acting executors and executrix are empowered, in all cases of dispute or contention, to determine what is the intention of the testator, and their decision is declared to be final.

This power is given in the apprehension that he may have committed error. It is to be exercised in order to ascertain his intent in such cases. It certainly does not include the power of altering the will. It cannot be contended that this clause would protect the executors in refusing to pay legacies altogether, or in paying to A a legacy bequeathed to B, or in any other plain deviation from the will. In such case, what would be the remedy of the injured party? Is he concluded by the decision of the executors, or may he resort to a court of justice? But one answer can be given to these questions. So gross a departure from the manifest intent of the testator, cannot be the result of an honest endeavor to find that intent, and must be considered as a fraudulent exercise of a power given for the purpose of preserving peace, and preventing expensive and frivolous litigation.

But who is to determine what is a gross misconstruction of the will, if the party who conceives himself injured may not submit his case to a court of justice? And if his case may be brought before a court, must not that court construe the will rightly?

This is not the only objection which the plaintiffs in error must encounter in supporting their construction of this clause. The executors have not, we think, this power unaided by the executrix.

It is given to a majority of the acting executors, "his wife to have a voice as executrix." Her participating in the decision is indispensable to its validity.

If this power was given to her solely in her character as executrix, it is seriously doubted whether it can be exercised till she assumes that character.

Even had she united with the executors, this would certainly *be a case which might well be considered as an [*681] exception from the general operation of the power. The bonds to which it was applied are the bonds of one of the executors, and it was exercised by bestowing them on the executrix, instead of the persons to whom they were bequeathed by the testator.

In doing this, the executors have plainly misconstrued the will. The testator had not charged the $10,000 which were to be raised in order to rebuild the houses that were destroyed by fire, on these bonds, but on a different fund. It is, therefore, the very case put, of paying to the executors the legacy bequeathed to other persons. It may also be observed that neither of the executors, nor Mrs. Pray, say in their answer that this diversion of these bonds to a different purpose from that directed by the testator, was made from the belief that it was his intention in the event which had occurred. They refer to the clause and rely upon it, as if it had empowered them to do whatever they thought best in the progress of their administration, instead of doing what, in their best judgment, they believed to be his intention.

But, however correctly the will of the testator may have been construed in the circuit court, and we think it was construed correctly, at least so far as respects the last two bonds mentioned in item fifty-one of the will of John Pray, deceased; other objections have been taken to the proceedings in the circuit court, which seem to be well founded.

The legacy for which this suit is instituted, is given jointly to several persons in different families. The legatees take equally, and the numbers in neither family are ascertained by the will. Under such circumstances, we think all the claimants ought to be brought before the court. The rights of each individual depend upon the number who are entitled, and this number is a fact which must be inquired into before the amount to which any one is entitled can be fixed. If this fact were to be examined in every case, it would subject the executors to be harassed by a multiplicity of suits; and if it were to be fixed by the first decree, that decree would not bind persons who were not parties. The case cannot be distinguished from the rule which is applied to residuary legatees.

The bill filed in this case does not even state the number of persons belonging to the different families, nor to that family in whose behalf this suit is brought. Nor does it assign any reason for not making the proper parties. It does not allege that the other legatees refuse to join as plaintiffs, or that they cannot be made defendants.

For this cause the decree must be reversed, and the case remanded to the circuit court, that the plaintiffs may amend their bill.

[*682] * The objections to the report are not entirely unfounded, and it is not quite satisfactory.

It does not, we think, show with sufficient clearness whether the plaintiffs in that court were entitled to the first bond. But as the case must go back to amend the bill, a new report will of course be made, and if that shows that the funds of the estate were sufficient to pay the debts and legacies, without applying this bond to that purpose, the plaintiffs below will be entitled to that also.

This cause came on, &c., in consideration whereof it is decreed and ordered by this court that the decree of the circuit court in this cause be and the same is hereby reversed and annulled; and it is further ordered that the cause be remanded to the said circuit court for further proceedings to be had therein, and that the plaintiffs may amend their bill.

WILLIAM B. ALEXANDER, FRANCIS SWANN, and THOMAS SWANN, Plaintiffs in Error, *v.* ELISHA BROWN, Defendant in Error.

1 P. 683.

A notice of a motion for an execution under a forthcoming bond, by the law of Virginia, is not inoperative because it describes the writ of *fi. fa.*, as issued against the judgment-debtor who gave the bond, when in fact it was against him and another.

THIS case was argued by *Swann*, for the plaintiffs, and *Jones*, for the defendant.

The material facts of the case appear in the opinion of the court.

MARSHALL, C. J., delivered the opinion of the court.

This was a motion to the circuit court for the District of Columbia, sitting in Alexandria, for an award of execution upon a forthcoming bond, taken in pursuance of the execution law of Virginia. That law directs that, if the owner of any goods or chattels which shall be taken by virtue of a writ of *fieri facias*, shall tender sufficient security to have the same goods and chattels forthcoming at the day of sale, it shall be lawful for the sheriff or other officer, to take bond from such debtor and securities, payable to the creditor, reciting the service of such execution, and the amount of the money or tobacco due thereon, and with condition to have the money or tobacco forthcoming at the day of sale appointed by such sheriff or other officer, and shall thereupon suffer the said goods and chattels to remain in the possession, and at the risk of the debtor, until that time. And if the owner of

such goods and chattels shall fail to deliver up the same, according to the condition of the bond, or pay the money or tobacco mentioned in the execution, such sheriff or other officer shall return the bond to the office of the clerk of the court, from whence the execution issued, to be there safely kept, and to have the force * of [*684] a judgment; and thereupon it shall be lawful for the court when such bond shall be lodged upon the motion of the person to whom the same is payable, his executors or administrators, to award execution for the money and tobacco therein mentioned, with interest thereon from the date of the bond till payment, and costs; provided the obligors, their executors, or administrators, or such of them against whom execution is awarded, have ten days' previous notice of such motion.

In this case, the condition of the bond recited a *fieri facias* against William B. Alexander and Richard B. Alexander, but was levied on the property of William B. Alexander only. The bond was executed by William B. Alexander and his sureties. The notice of the motion to award execution on this bond, was addressed to the obligors, and imported that the motion was to award execution on their forthcoming bond, bearing date, &c., and taken by virtue of a writ of *fieri facias* issued, &c., "in my name, against William B. Alexander, &c."

On the motion, the forthcoming bond, and the execution on which it was taken, were shown to the court; and the proceedings were regular in all respects, except that the notice stated the bond to be taken by virtue of a writ of *fieri facias*, issued against William B. Alexander, whereas it was in fact issued against William B. Alexander and Richard B. Alexander. It was admitted that this was the execution on which the forthcoming bond was taken, and the only execution in which the said William B. Alexander was a party.

The counsel for the defendants took exceptions to the notice, but the court gave judgment on the motion, which judgment is brought before this court by a writ of error.

The Act of Assembly prescribes that the forthcoming bond shall recite the material parts of the execution on which it is taken, but gives no other direction respecting the notice, than that it shall be served ten days before the motion. Its sole purpose is to inform the party that the motion is to be made, thereby enabling him to show that the money has been paid; or that, for any other reasons, execution ought not to be awarded. If it gives him the information which enables him to do this, it effects all the substantial purposes of justice. A false recital of the execution would be fatal, because it might mis-

lead the obligor; but in this case the execution was against William B. Alexander, though not against him alone. He could not mistake the case in which the motion was to be made, because it is admitted that this was the execution on which the bond was taken, and the only execution in which the said William B. Alexander was a party.

After judgment has been rendered, an execution issued thereon and levied, the property restored to the debtor on his bond to
[*685] *produce it on the day of sale, and his failure to do so, we do not think that nice and technical objections to the notice, where every purpose of substantial justice is effected, ought to be favored. The law only requires notice, and where the notice is sufficiently explicit to render mistake impossible, we think it justifies the award of execution.

The judgment is affirmed, with costs and damages, at the rate of six per centum per annum.

RICHARD BIDDLE, Administrator, &c., of JOHN WILKINS *v.* JAMES C. WILKINS.

1 P. 686.

To an action of debt on a judgment recovered by the plaintiff as administrator, *ne unques administrator*, or any thing equivalent to it, is not a good plea in bar.

In such an action, the plaintiff may declare personally and not in his representative character, and is not bound to make profert of his letters of administration.

Coxe, for the plaintiff; *Baldwin* and *Jones*, contrà.

[*690] *THOMPSON, J., delivered the opinion of the court.

This case comes up from the district court of the United States, for the Mississippi district, upon a writ of error.

The action in the court below was founded upon a judgment obtained in the district court of the United States for the western district of Pennsylvania, in the term of October, in the year 1823, for the sum of $32,957.34. The declaration is in the usual form of an action of debt on a judgment.

The defendant pleads in bar, 1. That the plaintiff is not, and never was administrator of John Wilkins, deceased. 2. That at the January term, in the year 1817, of the orphans' court for the county of Adams, and State, (then territory,) of Mississippi, he, the defendant, was duly appointed sole administrator of John Wilkins, deceased, and entered into bond with security, and took the oath pre-
[*691] scribed in such case, according to the *statute in such case made and provided; and that he took upon himself the duty

and office of administrator, and has continued to act as such administrator ever since. 3. That the judgment in the declaration mentioned, was obtained by fraud.

To the first two pleas a special demurrer was interposed, and issue to the country taken upon the third, and judgment rendered for the defendant, upon the demurrer; to reverse which the present writ of error has been brought.

The first plea, of *ne unques administrator*, has been abandoned as altogether untenable, and the counsel, on the part of the defendant in error, have rested their argument entirely on the validity of the second plea, and have treated this as a plea in bar to the jurisdiction of the court, in which the judgment was rendered. It is a little difficult to discover what is the true character of this plea. It can, in substance, amount to nothing more than an allegation that the plaintiff was not the lawful administrator of John Wilkins. And in that respect, is but a repetition of the same matter set up in the first plea, and that, too, in a more exceptionable form. For the conclusion is drawn argumentatively from the fact set up in the plea that he, the defendant, was duly appointed sole administrator of John Wilkins, in the orphans' court of the county of Adams in the State of Mississippi, and thence to infer that the plaintiff could not be the lawful administrator in Pennsylvania. Such a plea will not stand the test of a special demurrer. If it was intended by this plea to set up that the defendant was the first and only rightful administrator of John Wilkins, and that the debt due from him thereby became assets in his hands, the plea is defective, in not alleging when administration was granted to the plaintiff. The declaration alleges that John Wilkins died a citizen of Pennsylvania, and, from any thing that appears to the contrary, administration might have been granted to the plaintiff, before it was to the defendant.

The simple fact that administration had been granted to the defendant in Mississippi, would not raise any question with respect to the jurisdiction of the court, and if it furnished any matter of defence on the merits against the recovery, on the ground that it was taking out of his hands assets, the administration of which belonged to him, it should have been set up in the original action. Nothing appears to invalidate the judgment upon which the present action is founded. The cause of action does not appear; and we cannot say that the subject-matter was not within the jurisdiction of the court when it was rendered, or that there was any disability in the plaintiff to sue in that court; or that the judgment was void for any cause whatever. When the court in which the judgment is rendered has not

jurisdiction over the subject-matter of the suit, or when [* 692]

the judgment is absolutely void, this may be pleaded in bar, or may in some cases be given in evidence under the general issue. But the general rule is, that there can be no averment in pleading against the validity of a record, though there may be against its operation. And it is upon this ground that no matter of defence can be pleaded in such case, which existed anterior to the judgment. Chitty, Plead. 481. Hence, it has become a settled practice in declaring, in an action upon a judgment, not (as formerly) to set out in the declaration the whole of the proceedings in the former suit; but only to allege generally that the plaintiff, by the consideration and judgment of that court, recovered the sum mentioned therein. Chitty, 354.

The original cause of action having passed, *in rem judicatam*, how far the circumstance that the defendant had taken out letters of administration in Mississippi, would have availed as a defence against a recovery of the original judgment, cannot now be inquired into. It should have been set up in the former suit. But if the first administrator acquired a right to this debt as assets, and that matter was now open to inquiry, there is nothing appearing on this record to show that the defendant had acquired any such priority. When letters of administration were taken out by the plaintiff does not appear, nor was he bound to show that in his declaration. He was not bound to make profert of the letters of administration. This was so decided in the case of Crawford, administrator of Hargrove, *v.* Whitall, Doug. 4, note a. It was an action of *indebitatus assumpsit*, upon a judgment recovered by the plaintiff, as administrator, against the defendant, in the mayor's court at Calcutta. And the declaration alleged that the defendant was indebted to the plaintiff, as administrator, in the sum therein mentioned, which had been adjudged to him as administrator, &c. The defendant demurred specially, and showed for cause that there was no profert of letters of administration. But the court said this was unnecessary, because in this action (upon the judgment) the plaintiff had no occasion to describe himself as administrator. If then it was a fact, and of any importance in deciding the legal rights of the parties in this case, that administration had been first granted to the defendant in Mississippi, that should have been alleged in the plea, and no objection can be taken to the declaration as containing the first fault in pleading.

That it is not necessary, in cases like the present, for the plaintiff to name himself as administrator, follows as matter of course from his not being bound to make profert of his letters of admin-
[* 693] istration, * and that, when he does so name himself, it may be rejected as surplusage, is well settled by numerous authorities. In the case of Bonafous *v.* Walker, 2 Term Rep. 126, it

was objected that the action ought to have been brought by the plaintiff as administratrix; because the judgment on which the party had been committed in execution, had been obtained by her as administratrix of her husband. But the court said that was unnecessary, for the instant the plaintiff recovered the judgment, it became a debt due her on record, and was assets in her hands, for which it was not necessary for her to declare as administratrix. See also Hob 301, L. Ray, 1215. The case of Tallmadge, administrator, &c., *v.* Chappel and others, 16 Mass. Rep. 71, decided in the supreme judicial court of Massachusetts, is very full and explicit on this point. The plaintiff declared as administrator, &c., in debt upon a judgment recovered by him as administrator, in a court of common pleas, in the State of New York. The defendant pleaded in bar that the parties, at the time of rendering the judgment, were all inhabitants of the State of New York, and that the plaintiff was appointed administrator in that State, and had not been so appointed in Massachusetts. To which plea there was a demurrer and joinder, and the court held the plea bad. That the action, being on a judgment already recovered by the plaintiff, it might have been brought by him in his own name, and not as administrator. For the debt was due to him, he being answerable for it to the estate of the intestate, and it ought to be considered as so brought; his style of administrator being merely descriptive, and not essential to his right of recovery. That it was important to the purposes of justice that it should be so; for an administrator appointed in Massachusetts could not maintain an action upon this judgment, not being privy to it; nor could he maintain an action upon the original contract, for the defendants might plead in bar, the judgment recovered against them in New York. The debt sued for is, in truth, due to the plaintiff in his personal capacity, and he may well declare that the debt is due to himself.

If, in the case before us, the judgment is considered a debt due to the plaintiff in his personal capacity, it is totally immaterial whether the defendant was or was not administrator of John Wilkins, in the State of Mississippi. That could not in any manner affect the rights of the plaintiff. The plea, therefore, tenders an immaterial issue, and is bad on demurrer.

In whatever light, therefore, we consider this plea, whether as to the matter itself set up, or to the manner in which it is pleaded, it cannot be sustained as a bar to the present action.

We are accordingly of opinion that the judgment of the * court below must be reversed, and the cause sent back [* 694] with directions to allow the defendant to plead *de novo*, if he shall elect so to do.

This cause came on, &c., on consideration whereof, it is adjudged and ordered by this court that the judgment of the district court in this cause be and the same is hereby reversed and annulled; and it is further ordered that the cause be remanded to the said district court, with directions to permit the defendant to plead *de novo*, if he elect so to do.

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The case of Cooledge *et al. v.* Payson, (2 W. 66,) reviewed, and the rule confirmed, that a promise to accept, to amount to an acceptance, can be by a letter written within a reasonable time before or after the date of the bill, describing it in terms not to be mistaken, promising to accept it, and shown to the person who afterwards takes the bill on the credit of the letter. *Schimmelpennich* v. *Bayard*, 560.
2. If drawees were bound in good faith to accept, they cannot assume the position of acceptors *supra* protest, for the honor of an indorser. *Ib.*
3. If a drawee has been in the habit of receiving consignments from the drawer, and has an open account with him, he is not bound to accept a bill, though in fact drawn against a particular shipment, if the letter of advice merely directed him to charge the bill in account, and the state of the account was such that the drawee had no funds of the drawer. *Ib.*
4. An acceptor, *supra* protest, for the honor of the indorser, may, on payment of the bill, recover of the indorser, though he accepted at the instance of the drawee, and as his agent, provided the indorser is not damnified by this indirect mode of proceeding on the part of the drawee. *Konig* v. *Bayard*, 558.
5. A mere agreement by the holder with the drawer for delay, without a consideration, and not communicated to the indorser, does not discharge the indorser. *M'Lemore* v. *Powell*, 353.
6. If an indorser who has not been duly notified unconditionally promise to pay the note, with a knowledge of all material facts, it is not necessary to prove notice or demand; but saying he knew the maker had not paid it, and was not to pay it, that it belonged to himself alone to pay it, is not sufficient, unless the indorser knew there had been no demand, and that so he was discharged. *Thornton* v. *Wynn*, 108.
7. An indorser resided in the country, two or three miles from the town of Georgetown, where the note was payable, and was in the habit of receiving his letters at the post-office of that place; held, that a notice put into that post-office and

directed to him at Georgetown, was sufficient. *The Bank of Columbia* v. *Lawrence*, 707.

8. A bank which receives a bill for collection is the agent of the holder, not of another bank which merely transmits the bill for the holder, and is liable to the holder for a want of due diligence. *The Bank of Washington* v. *Triplett*, 433.
9. A time bill, not presented for acceptance, is not payable till the last day of grace. *Ib.*
10. The holder of a bill sent to a bank for collection, is bound by the settled usage of the banks of that place, as to the time of demanding payment. A time bill need not be presented for acceptance; and an omission thus to present it, or to apprise its owner that ineffectual inquiries have been made after the drawee, or failure to protest for non-acceptance, is not negligence in a bank holding it for collection, provided the bank acted, in those particulars, according to its settled usage. *Ib.*
11. It is sufficient evidence of a demand of payment of a note made payable at a particular bank, that the note was at the bank, was its property, and was unpaid at maturity. *Fullerton* v. *The Bank of the United States*, 723.
12. If a note is discounted in renewal of a former note, the law does not prevent the bank from charging the former note to the last indorser, and crediting him with the proceeds of the last note. *Ib.*
13. There is nothing in the constitution or laws of the United States, to prevent the circuit court of the United States for Ohio from adopting the act of that State concerning actions against drawers and indorsers. *Ib.*
14. Under the statute of Virginia, giving to debts due on protested bills of exchange, the rank of judgment debts, a joint indorser, who has paid more than his proportion of the debt, has a right to satisfaction out of the assets of his co-indorser with the priority of a judgment creditor. *Lidderdale's Executors* v. *Robinson's Executor*, 382.
15. Wherever the government of the United States, through its lawfully authorized agents becomes the holder of a bill of exchange, it is bound to use the same diligence, in order to charge the indorser, as in a transaction between private individuals. *The United States* v. *Barker*, 356.

ADMIRALTY, 2; AGENT; EVIDENCE, 7; USURY.

BOND.

1. Under a bond to remain a true prisoner until lawfully discharged, a discharge under a resolve of the legislature, passed in conformity with an ancient usage thus to relieve from imprisonment, is a lawful discharge, and does not impair the obligation of the contract. *Mason* v. *Haile*, 227.
2. A condition of a cashier's bond, "well and truly to execute the duties of cashier," includes not only honesty, but reasonable skill and diligence. *Minor* v. *The Mechanics' Bank of Alexandria*, 445.
3. A usage of the board of directors, to permit the cashier to misapply the funds of the bank, cannot exonerate his sureties. *Ib.*
4. The cashier's bond, in this case, was held to cover all defaults in duties, from time to time annexed to the office, by those having the control of the bank. *Ib.*
5. If a cashier, on leaving his office, fail to pay over or account to the bank for any part of the moneys of the bank received by him, the presumption is that he wilfully wasted or misapplied them, and the burden is on him or his sureties to show the contrary. *Ib.*
6. The postmaster-general has power to take a bond from a postmaster for the payment of moneys received by him in his official capacity. *The Postmaster-General of the United States* v. *Early*, 86.
7. Including in an official bond other things which are separable from the subjects for which it may lawfully be taken, does not necessarily vitiate it. *Ib.*

8. Laches of the officers of the United States does not of itself discharge sureties on an official bond. *Dox* v. *The Postmaster-General of the United States*, 596.
9. No presumption of payment of such a bond arises from the lapse of a little more than five years. *Ib.*
10. Under a marshal's bond, the cause of action does not accrue to a party plaintiff, whose judgment the marshal fails to satisfy, until the final judgment has been rendered, though he may have before that time wrongfully used money in his hands bound for the judgment. *Montgomery* v. *Hernandez*, 81.
11. The question, whether a *nolle prosequi* may be entered against one or more defendants, in an action on a joint and several bond, is a matter of practice, to be decided upon considerations of policy and convenience. *Minor* v. *The Mechanics' Bank of Alexandria*, 445.
12. The defendants having severed in their pleadings, and no right to contribution being affected, a *nolle prosequi* entered after judgment against the sureties, as to the principal obligor, was held regular. *Ib.*
13. Relief in equity against a judgment at law, upon certain bonds given for the indemnity of the obligee, as indorser of notes drawn by the obligor, the obligee having been indemnified. *Scott* v. *Shreeve*, 390.
14. The assignee of such bonds takes them subject to all equities existing between the original parties. *Ib.*
15. A notice of a motion for an execution under a forthcoming bond, by the law of Virginia, is not inoperative because it describes the writ of *fi. fa.*, as issued against the judgment-debtor who gave the bond, when in fact it was against him and another. *Alexander* v. *Brown*, 768.

CORPORATION, 1. 2; COURTS OF THE UNITED STATES, 4. 9; EVIDENCE, 11; PLEADING, 1; POSTMASTER; RESPONDENTIA; SURETY.

BY-LAW.

CORPORATION, 2.

CAPTURE.

BANKRUPT; PRIZE.

CASHIER.

BOND, 2-4; CORPORATION, 1, 2; SURETY, 3. 4.

CHARGE.

DEVISE, &c. 9–11.

COMMERCE.

CONSTITUTIONAL LAW, 4.

CONSTITUTIONAL LAW.

1. An insolvent law of a State does not impair the obligation of future contracts between its citizens. *Ogden* v. *Saunders*, 132.
2. But it cannot affect the rights of creditors who are citizens of other States. *Ib.*
3. The decision in Ogden *v.* Saunders applies, where the action is brought in the court of some other State than the one where the discharge has been obtained. *Shaw* v. *Robbins*, 226, *n.*
4. A state law requiring an importer to take a license and pay fifty dollars, before he should be permitted to sell a package of imported goods, is in conflict with that provision of the constitution of the United States which prohibits a State from laying any imp st, &c., and also with the clause which declares that congress shall have power to regulate commerce, &c. *Brown* v. *Maryland*, 262.

5. A court erected by the territorial legislature of Florida to try and determine cases of salvage, is in conformity with the constitution and laws of the United States. *The American Insurance Company* v. 356 *Bales of Cotton*, 685.
6. A case in admiralty is not "a case arising under the constitution and laws of the United States," within the meaning of the 8th section of the act of March 3, 1823, (3 Stats. at Large, 752,) to amend the act organizing the Territory of Florida. *Ib.*
7. Whether the power of congress to govern the territories is derived from the right of the United States to acquire territory, or from that clause in the constitution which empowers congress "to make all needful rules and regulations concerning the territory and other property of the United States," the possession of the power is unquestioned. *Ib.*
8. A territorial court held by judges whose appointments are for four years, cannot be the depositary of any part of the judicial power conferred by the constitution on the general government. *Ib.*

BILLS OF EXCHANGE, &c. 13; BOND, 1; MILITIA; NONSUIT.

CONTRACT.

Where A agreed to ship sugars to B, for account of C, by such vessel as C might designate — held, that C might empower B to designate the vessel. *D'Wolf* v. *Rabaud*, 672.

CONSTITUTIONAL LAW, 1–3; EVIDENCE, 6; FRAUDS, STATUTE OF; SALE, 3–5.

CORPORATION.

1. The acceptance of a cashier's bond by the board of directors of the bank, may be proved, without the production of a written record, by the facts that the person acted as cashier, and was recognized as such by the directors, and that the bond was required to be given as a condition precedent to his so acting, and was actually among the corporate documents. *The Bank of the United States* v. *Dandridge*, 29.
2. If a provision in a charter or by-law be directory merely, a deviation from it cannot be taken advantage of by third persons. *Ib.*
3. The subscription of the whole amount of the capital stock of a bank is not a condition precedent to its corporate existence, unless made so by the terms of its charter. *Minor* v. *The Mechanics' Bank of Alexandria*, 445.

ABATEMENT, 1; COURTS OF THE UNITED STATES, 11.

COSTS.

1. No judgment or decree can be rendered directly against the United States for costs and expenses. *The Antelope*, 347.
2. The fees and compensation to the marshal, for keeping, &c., captured Africans, where his fees or compensation are chargeable to the United States, are to be paid out of the treasury, upon a certificate of the amount, to be made by the court, or one of the judges. *Ib.*

AMENDMENT.

COURT-MARTIAL.

MILITIA, 3. 4.

COURTS OF THE UNITED STATES.

1. If both parties assert title under an act of congress, this court has jurisdiction, under the 25th section of the Judiciary Act. (1 Stats. at Large, 85.) *Ross* v. *Barland*, 752.
2. Under the 25th section of the Judiciary Act, though a treaty or act of congress need not be specially pleaded, the record must show a complete title under the

treaty or act relied on, and that the court below decided against its validity. *Hickie* v. *Starke*, 476.

3. Under the 25th section of the Judiciary Act, (1 Stats. at Large, 85,) it is not every misconstruction of an act of congress which can be reëxamined; the decision must have been against some right, &c., so claimed under such an act. *Montgomery* v. *Hernandez*, 81.

4. This court cannot reëxamine the decision of a state court allowing an action on a marshal's bond in the name of the person injured. *Ib.*

5. It must appear by the record that one of the specific questions described in the 25th section of the Judiciary Act necessarily arose, and was determined adversely to the right, &c., claimed under the constitution, or some law or treaty of the United States; otherwise, this court has not jurisdiction. *Williams* v. *Norris*, 72.

6. The written opinion of a state court, filed among the papers, is not a part of the record, and cannot be examined under the 25th section of the Judiciary Act, (1 Stats. at Large, 85,) to ascertain the questions decided. *Ib.*

7. An order made by a court of a State, after the removal of the record by a writ of error, not by way of amendment, but introducing new matter, cannot be deemed a part of the record. *Ib.*

8. This court cannot take jurisdiction upon a certificate of a question on which the opinions of the judges of the circuit court are opposed, upon some proceeding subsequent to the decision of the cause in that court. *Devereaux* v. *Marr*, 131.

9. Under the act of March 3, 1815, (3 Stats. at Large, 245, sec. 4,) the circuit courts of the United States have jurisdiction of suits by the postmaster-general, upon official bonds of postmasters. *The Postmaster-General of the United States* v. *Early*, 86.

10. If it be the established practice of the courts of a State, in an action of ejectment, to look behind the patent and examine into the validity of the progressive stages of the title, this court, on a writ of error under the 25th section of the Judiciary Act, cannot examine the correctness of that practice. *Ross* v. *Barland*, 752.

11. The circuit court has not jurisdiction of a case in which a corporation is defendant, if the record contains no averment concerning the citizenship of the corporators. *Breithaupt* v. *The Bank of the State of Georgia*, 551.

ABATEMENT, 3; AMENDMENT; BILLS OF EXCHANGE, &c. 13; CONSTITUTIONAL LAW, 5–8; DEPOSITION; DEVISE, &c. 1; EQUITY, 4. 5; INJUNCTION, 1. 2; MANDAMUS; NONSUIT; PRACTICE; WRIT OF ERROR.

CURTESY.

In Kentucky, seisin in deed is not essential to a tenancy by the curtesy, if the lands were vacant — seisin in law is sufficient. *Davis* v. *Mason*, 679.

CUSTOM AND USAGE.

BILLS OF EXCHANGE, &c. 10; BOND, 1. 3; PRACTICE, 4; PUBLIC LANDS, 12.

DAMAGES.

SEIZURE.

DEBT.

EXECUTORS, &c.

DECREE.

JUDGMENT, &c.

DEED.

1. By the statutes of Ohio, an unrecorded deed is void as against one to whom the

grantor was decreed by a court of chancery to make a title, such decree operating as a conveyance. *Steele's Lessee* v. *Spencer*, 694.

2. The question whether an alteration was made in a deed is for a jury; whether an alteration, if made, was material, is for the court. *Ib.*

3. The privy examination and acknowledgment of the deed of a *feme covert* cannot be proved by parol. *Elliott* v. *Piersol's Lessee*, 601.

4. When the clerk has made a record of his certificate of such examination and acknowledgment, he is *functus officio*, and cannot afterwards amend the certificate. *Ib.*

5. If a real conveyance of land has been made to a citizen of another State, who brings his action therefor, it is of no importance that the grantor was induced to convey because he thought his title would be held good in a court of the United States, and bad in a court of the State, nor that the conveyance, though in form absolute, was really but a mortgage. *M'Donald* v. *Smalley*, 732.

EQUITY, 3; HUSBAND AND WIFE.

DEPOSITION.

1. Under the 30th section of the Judiciary Act, a deposition is not admissible if the certificate does not clearly show the deposition was reduced to writing in the presence of the magistrate. *Bell* v. *Morrison*, 612.

2. Cross-examining a witness is a waiver of irregularity in the time of taking the deposition. *The Mechanics' Bank of Alexandria* v. *Seton*, 585.

DEVISE AND LEGACY.

1. This court adopts the decisions of the highest court of a State settling a rule of construction of devises of lands. *Jackson* v. *Chew*, 94.

2. A possession of land taken and held under an execution, not against the lawful owner, does not prevent him from devising the land under the law of New York. *Waring* v. *Jackson*, 702.

3. A testator having empowered his executors, his wife to have a voice as executrix, to decide finally what was his intention, in case of dispute — held, that if this power was valid, it did not enable the executors to decide contrary to the plain intent of the testator, to be judged of by a court of justice, nor to decide a question in which they or either of them was interested. *Pray* v. *Belt*, 760.

4. Construction of a will; legacy vested and payable from a specific fund. *Ib.*

5. Under a devise to two sons in fee, with a clause that if either die without issue, the survivor should take his part, and if both die without issue, then over. Held, that, under the law of New York, nothing passed by this last limitation over. *Waring* v. *Jackson*, 702.

6. In New York, a devise over to a survivor on failure of issue is deemed to be on a definite and not an indefinite failure of issue, and so is good by way of executory devise, and does not create an estate tail by implication, but a fee-simple, defeasible by death without issue in the lifetime of the survivor. *Jackson* v. *Chew*, 94.

7. An absolute bequest of certain slaves to P. H. is qualified by a subsequent limitation over, that if either of the testator's grandchildren, P. H. or J. D. A., should die without a lawful heir of their bodies, that the other should heir its estate, which converted the previous estate into an estate tail; and there being no words in the will which restrained the dying without issue to the time of the death of the legatee, the limitation over was held to be on a contingency too remote. *Williamson* v. *Daniel*, 362.

8. The rule of *partus sequitur ventrem* is universally followed, unless there be something in the terms of the instrument which disposes of the mother, separating the issue from her. *Ib.*

9. A devise of a tract of land to A., "he paying all my debts," charges the debts on the land, and gives the other devisees and legatees a right to maintain a bill to have

the debts paid thereout. The creditors need not be made parties. *Potter* v. *Gardner*, 311.

10. A purchaser from the devisee may be charged for the purchase-money remaining in his hands, and for what he has aided the devisee in misapplying. *Ib.*

11. Though a will charging debts on the testator's "estate" may subject his lands to their payment, yet, if the context shows the testator referred only to his personalty by the word estate, the lands are not charged. *Archer* v. *Deneale*, 711.

PARTIES, 4; WILL.

DISCOVERY.

1. A bill in equity for discovery and to charge the defendants with the payment of certain bills issued by a voluntary banking association of which they were members, such associations being prohibited under penalties by the law of the State where the business was carried on, cannot be maintained. *The United States* v. *The Saline Bank of Virginia*, 477.

2. After discovery had, a suit for discovery merely cannot be revived. *Horsburg* v. *Baker*, 546.

EQUITY, 2.

DOWER.

INCUMBRANCE, 2.

DUTIES.

ADMIRALTY, 1; REVENUE LAWS.

EJECTMENT.

AMENDMENT; COURTS OF THE UNITED STATES, 10; PLEADING, 3; WRIT OF ERROR, 1.

EQUITY.

1. A court of equity has jurisdiction to compel a bank to open its transfer books and permit a transfer of its stock. *The Mechanics' Bank of Alexandria* v. *Seton*, 585.

2. Where a female slave was conveyed for the life of the grantee, reserving to the grantor the reversion and right to her increase, with a clause of forfeiture upon any sale by the grantee, though the reversioner cannot have the aid of a court of equity to enforce the forfeiture, he may, to obtain discovery and an injunction to restrain alienation until the title can be tried at law. *Horsburg* v. *Baker*, 546.

3. Where the equity of a bill rests upon the loss of a deed, an affidavit of its loss should be annexed to the bill; but the want of it is only cause of demurrer, and is waived by answering. *Findlay* v. *Hinde*, 552.

4. The practice of the circuit courts in equity has been prescribed by this court, and should be followed to the exclusion of the practice of the state courts. *M'Donald* v. *Smalley*, 732.

5. If the circuit court has dismissed the bill for want of jurisdiction, and the decree is reversed, this court will not hear the merits, but remand the cause. *Ib.*

ANSWER; BOND, 13. 14; DISCOVERY; MISTAKE OF LAW; MORTGAGE; PARTIES, 1–5: PUBLIC LANDS, 11; SPECIFIC PERFORMANCE.

EVIDENCE.

1. Declarations of a master concerning the voyage, made while endeavoring to hire a mate, and as inducements to him to engage, are evidence against his employer. *The United States* v. *Gooding*, 281.

2. A general agent of a manufacturing establishment gave a certificate that a certain amount was due on settlement, from the firm whose agent he was; held to be admissible evidence against his principals, when connected with circumstances which tended to prove that the debt was contracted for materials used by him in the manufacture. *Barry* v. *Foyles*, 592.

3. A judgment recovered on an account against the principal, is evidence of the amount due from him, in an action against a guarantor of the account. *Drummond* v. *Prestman*, 323.

4. If the execution of an original paper be admitted, and it is in the defendant's possession, a copy, in the defendant's handwriting, may be used in evidence without notice to produce the original. *Carroll* v. *Peake*, 428.

5. The affidavit of a party is competent evidence of the loss of a paper; it is not conclusive, but it is to be weighed by the court in connection with the circumstances. *Tayloe* v. *Riggs*, 713.

6. When the contents of a written contract are to be proved by parol, vague, or uncertain recollections are not sufficient; the substance of the agreement must be satisfactorily proved. *Ib.*

7. Parol evidence is admissible to prove that all the parties to a negotiable note agreed that payment should be demanded of the maker at a particular bank, the note being silent as to the place of payment or demand. *Pearson* v. *The Bank of the Metropolis*, 472.

8. Though declarations of aged and deceased members of a family, concerning its pedigree, are not admissible if made *post litem motam*, yet this rule applies only when the *lis mota* concerns the pedigree, not some other question involved in the title. *Elliott* v. *Piersol's Lessee*, 601.

9. A letter having been written to the defendant by a third person, requesting the defendant to ship sugars to the plaintiff, and the defendant having added to the letter the word "agreed," and signed his name — held, that parol evidence was admissible to prove that the plaintiff agreed to advance moneys to the third person on the faith of the shipment; that this agreement and the letter and the assent of the defendant were parts of one transaction; and the written paper was made for the purpose of being delivered to the plaintiff, and was so delivered; and this being proved, it was further held that the contract of the defendant was not within the statute of frauds of New York. *D'Wolf* v. *Rabaud*, 672.

10. A witness may be asked whether he was agent for the plaintiff before any evidence of the manner of creating his agency. *Conard* v. *The Atlantic Insurance Co. of New York*, 637.

11. Proof of the signature of one of the parties, to a joint and several bond, is sufficient to make title as against him. *Ib.*

BILLS OF EXCHANGE, &c. 11; BOND, 9; CORPORATION, 1; DEED, 3; EXCEPTIONS, 2; FRAUDS, STATUTE OF, 1; SLAVES, &c. 1; WILL, 2.

EXCEPTIONS.

1. The court is not bound to modify the instructions prayed for by counsel; if not correct in point of law as prayed, they may rightfully be rejected. *Buck* v. *The Chesapeake Insurance Company*, 508.

2. A court is not bound to do more than to respond to a motion to reject evidence in the terms in which it is made. If the motion be to reject all, and some is competent, it is not error to deny the motion. *Elliott* v. *Peirsol's Lessee*, 601.

3. If a bill of exceptions does not contain some paper offered in evidence and certified by the clerk below to have been accidentally lost, such lost paper will be presumed to contain what was necessary to support the judgment, if such a presumption is possible. *Carroll* v. *Peake*, 428.

EXECUTION.

BOND, 15; JUDGMENT, &c. 8.

EXECUTORS AND ADMINISTRATORS.

1. To an action of debt on a judgment recovered by the plaintiff as administrator, *ne unques administrator*, or any thing equivalent to it, is not a good plea in bar. *Biddle* v. *Wilkins*, 770.
2. In such an action, the plaintiff may declare personally and not in his representative character, and is not bound to make profert of his letters of administration. *Ib.*

APPEAL, LIMITATIONS, &c. 2.

FLORIDA.

CONSTITUTIONAL LAW, 5–8; PUBLIC LANDS, 1.

FORFEITURE.

1. A claim having been admitted, the prosecutor must file an exceptive allegation, if the proceeding be in the admiralty, or a plea in abatement, if it be by an information at law, in order to put in issue the claimants' right to appear. *The United States* v. 422 *Casks of Wine*, 691.
2. The court may, in its discretion, refuse to restore property to a claimant, if the evidence at the hearing shows he ought not to receive it, though no forfeiture be decreed. *Ib.*

EQUITY, 2; INFORMATION; PRACTICE, 2; REVENUE LAWS.

FORTHCOMING BOND.

BOND, 15.

FRAUD.

INJUNCTION, 3; SALE, 2.

FRAUDS, STATUTE OF.

1. An item inserted in an account stated and settled, in the handwriting of the vendor, and signed by the vendee, in the words and figures following: "By my purchase of your half E. B. wharf and premises, this day agreed on between us, $7,578.63," is a sufficient memorandum within the statute of frauds, and parol evidence is admissible to fill up the initials. *Barry* v. *Coombe*, 743.
2. If the vendee under such a contract, gives notice he will not be bound by it, if the vendor does not pay the balance due on the account, and the vendor does not adopt the alternative tendered to him, the contract is not at an end. *Ib.*

EVIDENCE, 9.

FREIGHT.

INSURANCE, 6.

GRANT.

PUBLIC LANDS, 1–3.

GUARANTY.

EVIDENCE, 3.

HUSBAND AND WIFE.

Though a *feme covert*, abandoned by her husband, may contract debts as a *feme sole*,

she cannot, under the law of Maryland, convey her lands by her separate deed. *Rhea* v. *Rhenner*, 478.

DEED, 3. 4.

INCUMBRANCE.

1. A contract to sell to a third person three years previous, which has manifestly been abandoned by him, so that he could not compel a specific performance, is not a valid objection to a title. *Greenleaf* v. *Queen*, 499.
2. Nor is a claim for dower, if the purchaser knew or had the means of knowing its existence, and was aware he was purchasing of a trustee. *Ib.*

INDICTMENT.

SLAVES, &c. 4–9; TRIAL.

INFORMATION.

1. In general, a libel *in rem* for a forfeiture, which alleges the offence in the words of the statute, is sufficient. *The Palmyra*, 1.
2. In a libel *in rem*, under the acts of March 3, 1819, and May 15, 1820 (3 Stats. at Large, 510, 600,) for piratical aggressions, it is not necessary to allege or prove a conviction of the person for the criminal offence. *The Palmyra*, 1.

FORFEITURE.

INJUNCTION.

1. An injunction out of the circuit court, to stay proceedings on a judgment at law, in that court, may issue, notwithstanding the pendency of a writ of error on the judgment in this court. *Parker* v. *The Judges of the Circuit Court of Maryland*, 358.
2. An injunction issued by order of the district judge, expires at the next term of the court, unless continued by the court; but the denial of several successive motions to dissolve the injunction, may, under circumstances, be considered as equivalent to an order for renewing it. *Ib.*
3. A judgment creditor agreed with his debtor to resort for payment to a fund created by a deed of trust, which, without the knowledge of the creditor, contained a limitation of time for parties to come in, and the time had expired; held, that the debtor could not enjoin the judgment without first enabling the creditor to come in under the deed. *The Mechanics' Bank of Alexandria* v. *Lynn*, 633.

BOND, 13. 14; EQUITY, 2.

INSOLVENT.

CONSTITUTIONAL LAW, 1–3; UNITED STATES.

INSPECTOR-GENERAL.

ADJUTANT, &c.

INSURANCE.

1. A policy "at and from A. to T. and two other ports in the West Indies, and back to her port of discharge, in the United States, upon all lawful goods," &c., being construed with reference to the known course of the trade, covers the return cargo. *The Columbian Insurance Company* v. *Catlett*, 234.
2. Delay to accomplish the objects of the voyage by selling the cargo reasonably, and according to the known course of the trade, is not a deviation. *Ib.*
3. If a sale of a perishable cargo becomes necessary, in consequence of a peril of the sea, before arrival at the port of destination, it is a case of constructive total loss. *Ib.*
4. Though a policy requires sixty days' notice of an abandonment, the same letter containing the notice may operate as an abandonment at the end of sixty days. *Ib.*

5. Where a specific sum was insured on cargo for a round voyage, the whole sum was at risk, though part of the outward cargo had been landed, that amount of property being on board. *The Columbian Insurance Company* v. *Catlett*, 234.
6. *Pro rata* freight is not a charge on salvage money abandoned to the underwriter. *Ib.*
7. It is not necessary to aver an abandonment in the declaration. *Ib.*
8. Insurance effected by an owner after a loss, in good faith, is not vitiated by the fact that the master concealed the loss from the owner, with intent to have him procure insurance. *The General Interest Insurance Company* v. *Ruggles*, 254.
9. If the insurer make no inquiry as to the neutrality of the interest, an insurance "for whom it concerns" covers belligerent property. *Buck* v. *The Chesapeake Insurance Company*, 508.
10. Insurers are presumed to know the state and incidents of the trade in which property covered by them is represented to be embarked, and this may include a practice for neutrals to cover belligerent property. *Ib.*
11. But if an express representation is made that the property is neutral, a policy "for whom it concerns" does not cover property of a belligerent. *Buck* v. *The Chesapeake Insurance Company*, 508.
12. A master, being the legal owner of the whole cargo and the equitable owner of part of it, has an insurable interest in the whole. *Ib.*
13. Certain statements held not to amount to a representation of neutrality of property. *Ib.*
14. Seaworthiness for lying in port may be quite a different thing from seaworthiness for a voyage. *M'Lanahan* v. *The Universal Insurance Company*, 518.
15. Seaworthiness and deviation are mixed questions of fact and law, and the aid of a jury is generally necessary to their decision. *Ib.*
16. If a party who has ordered insurance has information of a loss, he is bound to use due and reasonable diligence to make it known to his agent, and to countermand his order. *Ib.*
17. What is such diligence depends on the circumstances of each case, and is principally matter of fact for a jury. *Ib.*
18. The question of materiality of the time of sailing, to the risk, is a question of fact for the jury. *Ib.*
19. So are the questions, whether an omission to state the time was fraudulent, and whether it misled the underwriter. *Ib.*

BANKRUPT.

INTERNATIONAL LAW.

SEIZURE.

JOINT DEFENDANTS.

BOND, 11. 12.

JUDGMENT AND DECREE.

1. A prior judgment lien, during the time fixed by law for its existence, is not displaced by delay and a levy under a subsequent judgment lien. *Rankin* v. *Scott*, 104.
2. In Virginia, a confession of judgment is a release of errors. *Mandeville* v. *Holy*, 499.
3. A discharge, by the secretary of the treasury, of the principal debtor taken on a *ca. sa.* pursuant to the act of June 6, 1798, (1 Stats. at Large, 561,) does not release his sureties from the judgment, nor operate as a satisfaction thereof. *The United States* v. *Stansbury*, 704.

BILLS OF EXCHANGE, &c. 14; BOND, 10. 13. 14; DEED, 1; EVIDENCE, 3; EXECUTORS, &c.; INJUNCTION, 1. 3; PUBLIC LANDS, 7; VERDICT; WRIT OF ERROR, 2.

JURISDICTION.

The jurisdiction of a county court may be inquired into by a circuit court of the United States when the proceedings of the former are relied on in the latter; and if no jurisdiction existed the proceedings are void. *Elliott* v. *Piersol's Lessee*, 601.

JURY.

DEED, 2; INSURANCE, 15–19; LAW AND FACT; NONSUIT.

KENTUCKY.

CURTESY; PUBLIC LANDS, 11; WILL, 2.

LAPSE OF TIME.

SLAVES, &c. 1.

LAW AND FACT.

When a matter of fact necessary to a defence is controverted, it is error to direct the jury that the matters produced in evidence are sufficient to bar the action, and the jury ought to find for the defendant; for this instruction withdraws the fact from the jury. *The United States* v. *Tillotson*, 106.

DEED, 2; INSURANCE, 15–19.

LEX LOCI.

WILL, 1.

LIEN.

ADMIRALTY, 1. 2; JUDGMENT, &c. 1; MECHANICS' BANK OF ALEXANDRIA; MORTGAGE.

LIMITATIONS OF SUITS.

1. To remove the bar of the statute of limitations by a new promise, it must be determinate and unequivocal; and if a new promise is to be raised by implication of law from an acknowledgment, there must be an unqualified acknowledgment of a subsisting debt which the party is liable and willing to pay. *Bell* v. *Morrison*, 612.
2. A declaration by the personal representatives of the original debtor, deceased, that he had no funds to pay the debts of the testator, will not take the case out of the statute of limitations. *Thompson* v. *Peter*, 361.
3. One partner cannot deprive the firm of the bar of the statute of limitations, after a dissolution of the partnership. *Bell* v. *Morrison*, 612.

LOST INSTRUMENT.

EQUITY, 3; EVIDENCE, 5; EXCEPTIONS, 3.

LOTTERY.

WASHINGTON.

MANDAMUS.

This court will not grant a *mandamus* to revise the proceedings of a circuit court as to the pleadings. This can only be done by a writ of error after a final judgment. *The Bank of Columbia* v. *Sweeny*, 701.

MARSHAL.

BOND, 10; COSTS, 2.

MARYLAND.

ALIEN; HUSBAND AND WIFE.

MECHANICS' BANK OF ALEXANDRIA.

The Mechanics' Bank of Alexandria, under its charter, has no lien, for debts of a trustee, on stock held in trust, with the knowledge of the board of directors. *The Mechanics' Bank of Alexandria* v. *Seton*, 585.

MILITIA.

1. The act of February 28, 1795, (1 Stats. at Large, 424,) which confers power on the President to call forth the militia in certain exigencies, is a constitutional law, and the President is the exclusive and final judge whether the exigency has arisen *Martin* v. *Mott*, 10.
2. A requisition by him is an order, and it is not necessary in pleading to set out the order; it is enough to aver that it was made. *Ib.*
3. Disobedience of an order of the President calling forth the militia, renders a citizen liable to trial by a court-martial. *Ib.*
4. Such a court-martial is not required to be organized according to the rules and articles of war, under the acts of congress, nor did its authority expire with the war. *Ib.*

MISDEMEANOR.

SLAVES, &c. 6.

MISTAKE OF LAW.

Where parties deliberately agree not to secure a debt by mortgage, but to give and receive a power of attorney authorizing the creditor to sell certain property of the debtor, and apply its proceeds to the payment of the debt, and the power is annulled by the death of the debtor, a court of equity will not direct a new security to be given, or fix a lien on the property as security for the debt, though satisfied that the parties acted in ignorance of that rule of law which makes the death of the constituent a revocation of the power. *Hunt* v. *Rousmaniere's Administrators*, 419.

MORTGAGE.

Equity does not treat a mortgage as a mere lien, but considers the mortgagee a trustee for the mortgagor. *Conard* v. *The Atlantic Insurance Co. of New York*, 637.

UNITED STATES.

NEW TRIAL.

1. On a motion for a new trial, if, upon the whole case, justice has been done, and the verdict is substantially right, no new trial is granted, though some mistakes may have been made. *M'Lanahan* v. *The Universal Insurance Company*, 518.
2. *Aliter* on a writ of error, for then the judgment must be reversed if any erroneous ruling appears by the record to have entered into it. *Ib.*

NEW YORK.

DEVISE, &c. 2. 5. 6; EVIDENCE, 9.

NOLLE PROSEQUI.

BOND, 11. 12.

NONSUIT.

A circuit court of the United States has not power to order a peremptory nonsuit against the will of the plaintiff. He has a right to have his case submitted to a jury *Elmore* v. *Grymes*, 668. *D'Wolf* v. *Rabaud*, 672.

NORTH CAROLINA.

PUBLIC LANDS, 10.

NOTICE.

BILLS OF EXCHANGE, &c. 6. 7; BOND, 15.

OHIO.

DEED, 1.

ORPHANS' COURT.

APPEAL.

PARTIES.

1. Though the rules as to parties in equity are somewhat flexible, yet where the court can make no decree between the parties before it, upon their own rights, which are independent of the rights of those not before it, it will not act. *Mallow* v. *Hinde*, 116.
2. An objection for want of parties ought not to prevail at the hearing, on appeal, except when the party is indispensably necessary. *The Mechanics' Bank of Alexandria*, v. *Seton*, 585.
3. To a bill for specific performance of a contract to convey land, the vendor is a necessary party, though he has parted with all title, and his grantees are made parties. *Findlay* v. *Hinde*, 552.
4. A legacy being given jointly to several families, whose individual members were not ascertained by the will, all the legatees are necessary parties to a bill for payment of the legacy. *Pray* v. *Belt*, 760.
5. A trustee, in whose name bank stock stands, and who is willing to transfer it to his *cestuis que trust*, is not a necessary party to a bill against the bank to compel it to allow a transfer. *Mechanics' Bank of Alexandria* v. *Seton*, 585.
6. Where the chief magistrate of a State is sued, not by his name, but in his official character, and the claim is made upon him solely by reason of his holding the office of governor, and no decree could be made against him personally, the State must be considered as the real party on the record. *The Governor of Georgia* v. *Madrazo*, 481.

PARTNERSHIP.

ABATEMENT, 2; ARBITRATION, 3. 4; LIMITATIONS, &c. 3.

PAYMENT.

BOND, 9.

PIRACY.

INFORMATION; SEIZURE.

PLEADING.

1. A replication to a plea of general performance, in an action on a bond should assign a special breach; but, after verdict, the omission to do so cannot be taken advantage of. *Minor* v. *The Mechanics' Bank of Alexandria*, 445.
2. A general averment in a declaration, of readiness to perform an agreement to take a lease, is good after verdict. *Carroll* v. *Peake*, 428.
3. An allegation that the lessor of the plaintiff is a citizen of the State of Missouri is sufficient, without an averment that Missouri is one of the United States. *Wright* v. *Hollingsworth's Lessee*, 515.
4. When a new count is filed, the defendant has a right to plead *de novo;* but if he goes to trial on the old plea, which puts the whole declaration in issue, there is no error. *Ib.*

ATTACHMENT; EQUITY, 3; EXECUTORS, &c.; INSURANCE, 7.

POOR DEBTORS.

BOND, 1.

POSTMASTER.

Under the act of April 30, 1810, s. 29, (2 Stats. at Large, 602,) though the postmaster-general is made liable for sums due from delinquent postmasters, if he does not cause a suit to be instituted within six months after a default, yet neither the postmaster nor his sureties are discharged by such omission to sue. *Dox* v. *The Postmaster-General of the United States*, 596.

BOND, 6. 7; COURTS OF THE UNITED STATES, 9.

PRACTICE.

1. This court possesses the power to reinstate any cause dismissed by mistake. *The Palmyra*, 1.
2. If a libel is not a sufficient basis for a decree, and the proofs show cause for condemnation, the case is remanded to the circuit court with directions to allow an amendment. *The Palmyra*, 1.
3. This court does not consider a point open for discussion which has been once deliberately decided. *The United States* v. 422 *Casks of Wine*, 691.
4. Though written rules are preferable for the purpose of adopting a practice created by a State law, yet the circuit courts of the United States may do this without a written rule, and such adoption is sufficiently evidenced by the course and usage of the court. *Fullerton* v. *The Bank of the United States*, 728.

BOND, 11. 12; COURTS OF THE UNITED STATES, 10; EQUITY, 4. 5; FORFEITURE; PLEADING; SLAVES, &c. 2. 3. 9; TRUST.

PRESIDENT.

MILITIA.

PRINCIPAL AND ACCESSORY.

SLAVES, &c. 6.

PRINCIPAL AND AGENT.

AGENT.

PRIZE.

Proceedings for condemnation upon captures made by public armed ships are in the name and authority of the United States, who prosecute as well for themselves as for the captors, and where damages are awarded against the latter, each have a right of appeal from that decree. *The Palmyra*, 1.

PUBLIC LANDS.

1. A grant made by the British governor of Florida, after the declaration of independence, within the territory lying between the Mississippi and the Chatahouchee rivers, and between the 31st degree of north latitude, and a line drawn from the mouth of the Yazoo River due east to the Chatahouchee, is invalid as the foundation of title in the courts of the United States. *Harcourt* v. *Gaillard*, 329.
2. Spanish grants made after the treaty of peace of 1783, between the United States and Great Britain, within the territory east of the River Mississippi, and north of a line drawn from that river, at the 31st degree of north latitude, east to the middle of the River Appalachicola, have no intrinsic validity, and the holders must depend for their titles exclusively on the laws of the United States. *Henderson* v. *Poindexter's Lessee*, 334.
3. No Spanish grant, made while the country was wrongfully occupied by Spain, can

be valid, unless it was confirmed by the compact between the United States and the State of Georgia, of the 24th April, 1802, or has been laid before the board of commissioners constituted by the act of congress of the 3d of March, 1803, (2 Stats. at Large, 229,) and of March 27, 1804, (2 Stats. at Large, 303.) *Henderson* v. *Poindexter's Lessee*, 334.

4. A warrant or order of survey of lands made by the Spanish authorities at Mobile, in the year 1806, did not confer a complete legal title. *De La Croix* v. *Chamberlain*, 386.
5. A donation certificate, under the act of March 3, 1803, (2 Stats at Large, 229,) gives a title superior to that acquired by a purchase at a public land sale. *Ross* v. *Barland*, 752.
6. No particular form of such certificate is required; it is sufficient if it shows the occupancy required by the act, and what land granted. *Ib.*
7. The commissioners under the act of 1803 were empowered to hear evidence, as to the time of the evacuation by the Spanish troops, and to decide on the fact. *Ib.*
8. The United States having received the cession of the lands northwest of the Ohio River, not only in trust for the Virginia troops on the continental establishment, but also for the use and benefit of the members of the confederation, have the right to prescribe the time within which Virginia military warrants might be located, and to annex conditions to the extension of the time. *Jackson* v. *Clark*, 786.
9. Under the act of March 2, 1807, (2 Stats. at Large, 424,) defective surveys protected the land from being patented under subsequent warrants and surveys by those claiming under the United States. *Ib.*
10. A question whether the French Lick reservation had been subjected to appropriation, by entry and survey, as vacant land, by statute of North Carolina or Tennessee. *Edwards's Lessee* v. *Darby*, 126.
11. A question in equity as to the title to a lot of land in the town of Lexington, Kentucky, reserved as public property, and claimed as having been appropriated by the plaintiff's ancestor. Bill dismissed under the circumstances of the case. *M'Connell* v. *The Trustees of the Town of Lexington*, 372.
12. It being a general custom on the sale of entries in a military tract, for the vendee to take his chance of a surplus or deficiency in quantity, the vendor must show a special contract in writing to entitle himself to such surplus. *Dunlap* v. *Dunlap*, 367.
13. An authority "to enter" a certain quantity of land does not authorize a location on lands previously appropriated, or withdrawn from the lands offered for sale. *Cholard* v. *Pope*, 376.

ASSIGNMENT; COURTS OF THE UNITED STATES, 10.

RATIONS.

ADJUTANT, &c.

RECORD.

COURTS OF THE UNITED STATES, 5–7; DEED, 4.

RESPONDENTIA.

1. The borrower, upon *respondentia*, has a right to apply the money lent as he pleases; it does not vitiate the bond, that its proceeds were applied to pay a prior loan. *Conard* v. *The Atlantic Insurance Company of New York*, 637.
2. A *respondentia* loan, made during a voyage, is legal. If the risk is taken for the whole voyage, it is like that assumed by underwriters, who insure "lost or not lost." *Ib.*

REVENUE LAWS.

1. Under the 68th section of the Collection Act of March 2, 1799, (1 Stats. at Large,

677,) teas, which have been regularly entered, landed, and stored, and the bond of the importer, without surety, given for the duties, pursuant to the 62d section, are not subject to forfeiture by being fraudulently withdrawn from the storehouse and concealed, because the duties have been "secured to be paid." *The United States* v. 350 *Chests of Tea*, 302.

2. To cause a forfeiture under the 43d section, the chests must be unaccompanied not only by the proper certificates, but by the marks required by the 39th section. *Ib.*

ADMIRALTY, 1; CONSTITUTIONAL LAW, 4.

SALE.

1. If the consignor is the sole owner of the goods, he may pass the title to them by a bill of sale, good as against all persons save a *bonâ fide* indorsee of the bill of lading; and if such assignment be made of an outward cargo, the title attaches to its proceeds sent home. *Conard* v. *The Atlantic Insurance Company of New York*, 637.
2. Want of possession of goods assigned while at sea, due diligence to take possession on arrival having been used, or rendered useless, is not a badge of fraud. *Ib.*
3. The contracts of vendor and vendee are construed to be dependent, unless a contrary intention plainly appears. *The Bank of Columbia* v. *Hagner*, 661.
4. To sustain an action at law against the vendee for not accepting the property, the vendor must aver and prove his readiness and offer to perform on the day fixed by the contract for performance. *Ib.*
5. Though the vendee took possession, if the vendor does not offer to perform, on the day, the vendee may relinquish the possession, and treat the contract as rescinded. *Ib.*
6. Breach of warranty, without an offer to return the property and rescind the contract, is not a defence to an action on a note given for the price of a chattel. *Thornton* v. *Wynn*, 108.
7. No particular form of notice of a sale under a deed of trust is prescribed by law; it is sufficient if the description of the land is reasonably certain, so as to inform the public of the property to be sold. *Newman* v. *Jackson*, 863.
8. Though a trustee to sell must, as against his *cestuis que trust*, pursue the mode of sale specified in the deed of trust, yet a purchaser cannot object to the title upon the ground of a departure from that mode, if the *cestuis que trust* have sanctioned it. *Greenleaf* v. *Queen*, 499.

ASSIGNMENT.

SALVAGE.

CONSTITUTIONAL LAW, 5; INSURANCE, 6.

SEIZURE.

Though probable cause is not a bar to damages for a mere municipal seizure, unless made so by statute, yet a seizure for piratical aggression is an exercise of a *quasi* belligerent right, and probable cause is a defence, as in prize causes. *The Palmyra*, 1.

SHIPS AND SHIPPING.

EVIDENCE, 1; RESPONDENTIA.

SLAVES AND SLAVE-TRADE.

1. Under the statute of Virginia, emancipating slaves brought into that State, unless the owner removing with them should take a certain oath within sixty days after such removal, the fact of the oath having been taken may be presumed by the lapse of twenty years, accompanied with possession. *Mason* v. *Matilda*, 379.

2. Further explanation of the decree of this court, in S. C. 10 W. 56, and 11 W. 412. *The Antelope*, 347.
3. The Africans captured, except those restored to the Spanish claimants to be delivered to the United States, absolutely and unconditionally, without the precedent payment of expenses. *Ib.*
4. Under an indictment framed on the Slave-Trade Act of April 20, 1818, (3 Stats. at Large 450,) it is sufficient that the owner, through his agents, fitted the vessel; and any preparations which clearly manifest and accompany an intent to prosecute a slave voyage, constitute such a fitting out as to be within the act. *The United States* v. *Gooding*, 281.
5. It is not necessary to charge in the indictment the particular acts of preparation. *The United States* v. *Gooding*, 281.
6. The crime is a misdemeanor, all are principals, and the words "aid and abet" are not used technically in the act. *Ib.*
7. A fitting out within the jurisdiction of the United States must be averred. *Ib.*
8. An averment of an intent that the vessel should be employed is bad; it must be "with intent to employ." *Ib.*
9. It is competent for the court at the trial to hear objections to the indictment, but it is not proper, except under extraordinary circumstances. *Ib.*

COSTS, 2; DEVISE, &c. 7. 8; EQUITY, 2.

SPAIN.

PUBLIC LANDS, 2–4; TREATY.

SPECIFIC PERFORMANCE.

If a vendor has conveyed, and the deed is not lost, but lacks some legal formality to pass the legal title, the vendee may have relief in equity, by a decree for specific performance, against the vendor, and those claiming under him with notice. *Findley* v. *Hinde*, 552.

INCUMBRANCE, 1; PARTIES, 3.

STATE.

PARTIES, 6.

STATUTE OF FRAUDS.

FRAUDS, &c.

STATUTES.

1. Though a mistaken opinion of the legislature concerning the law does not make the law, yet it may be so declared as to operate *in futuro*. *The Postmaster-General of the United States* v. *Early*, 86.
2. In the construction of a doubtful law, the contemporaneous construction of persons appointed to execute it, is entitled to great respect. *Edwards's Lessee* v. *Darby*, 126.

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1813, July 22, Direct Taxes, &c. 3 Stats. at Large, 22.
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1820, May 8, Relief of Representatives of Henry Wallis. 6 Stats. at Large, 246.
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1822, March 30, Government of Florida. 3 Stats. at Large, 654.
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1823, March 3, Government of Florida. 3 Stats. at Large, 750.
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SURETY.

1. The act of May 15, 1820, (3 Stats. at Large, 592,) does not discharge sureties on their existing bonds, though it requires new sureties to be given. *The United States* v. *Nicholl*, 315.
2. The taking of collateral security without suspending the original cause of action does not discharge a surety. *Ib.*
3. A resolution to suspend a cashier does not remove him from office, and for any defaults by him after the resolution, and before he is actually removed, his sureties are responsible. *M'Gill* v. *The Bank of the United States*, 320.

4. Sureties are discharged from the penalty of their bond only on payment of the principal, interest, and costs. *M'Gill* v. *The Bank of the United States*, 320.

BOND, 3–5. 8; JUDGMENT, &c. 8; POSTMASTER.

TENNESSEE.

PUBLIC LANDS, 10.

TERRITORY.

CONSTITUTIONAL LAW, 5. 8.

TREATY.

Under the treaty with Spain, of February 22, 1819, (8 Stats at Large, 252,) the commissioners had power to decide conclusively upon the amount and validity of claims, but not upon the conflicting rights of parties to the sums awarded by them. *Comegys* v. *Vasse*, 529.

TRIAL.

Where two or more persons are jointly charged in the same indictment with a capital offence, they have not a right, by law, to be tried separately without the consent of the prosecutor; but such separate trial is a matter to be allowed in the discretion of the court. *The United States* v. *Marchant*, 297.

TRUST.

If the original trustee is dead and another is appointed by the court, pending a suit to execute the trust, a supplemental bill should be filed, and a release required from the heir at law of the original trustee. *Greenleaf* v. *Queen*, 499.

INCUMBRANCE, 2; MECHANICS' BANK OF ALEXANDRIA; MORTGAGE; PARTIES, 5; SALE, 7. 8.

UNITED STATES.

Under the act of March 2, 1799, sect. 65, (1 Stats. at Large, 676,) the priority of the United States is a right to prior payment out of the funds in the hands of the assignees, and does not prevent the property assigned from vesting in them, nor does it affect a mortgage of part of the debtor's property made to secure a *bonâ fide* debt. *Conard* v. *The Atlantic Insurance Company of New York*, 637.

BILLS OF EXCHANGE, &c. 15; BOND, 8; COSTS; JUDGMENT, &c. 8; PRIZE; PUBLIC LANDS, 8. 9.

USURY.

If a valid promissory note of a third person be indorsed to secure collaterally, an usurious loan, no action can be sustained upon it by the indorsee against the maker, even if the usurious loan has been paid. *Gaither* v. *The Farmers and Mechanics' Bank of Georgetown*, 441.

VARIANCE.

ATTACHMENT.

VIRGINIA.

BILLS OF EXCHANGE, &c. 14; BOND, 15; JUDGMENT, &c. 2; PUBLIC LANDS, 8. 9; SLAVES, &c. 1.

VERDICT.

A verdict conditioned to be for the plaintiff, or defendant, as the court should be of

opinion for one or the other party upon the effect of a certain deed, but not identifying the deed, is insufficient to support a judgment. *M'Arthur* v. *Porter*, 735.

WARRANTY.

SALE, 6.

WASHINGTON.

The clause in the charter of Washington, that the city shall have power "to authorize the drawing of lotteries," &c., confers a power to be exercised, by drawing the lotteries on account, and at the risk, of the city, which is bound to the holder of a ticket to pay the prize it drew. *Clark* v. *The City of Washington*, 19.

APPEAL.

WILL.

1. A testamentary paper executed in a foreign country, even if executed so as to give it the effect of a last will and testament by the foreign law, cannot be made the foundation of a suit for a legacy in the courts of this country, until it has received probate here, in the court having the peculiar jurisdiction of the probate of wills and other testamentary matters. *Armstrong* v. *Lear*, 102.
2. Though the statute of Kentucky requires two subscribing witnesses to a will of lands, the evidence of one may prove the will. *Davis* v. *Mason*, 679.

WITNESS.

WILL, 2.

WRIT OF ERROR.

1. Where a recovery of a tract of land was had, in an action of ejectment, and a writ of restitution was awarded of a small portion thereof, of less value than $2,000, this court has not jurisdiction of a writ of error which brings up only the proceedings touching such restitution. *Grant* v. *M'Kee*, 557.
2. Where the record showed that, after the judgment of the circuit court for Harrison county (Kentucky) had been reversed by the court of appeals of that State, the case was remanded to the circuit court for further proceedings, the judgment was therefore held not "final," and this court dismissed a writ of error to the court of appeals. *Winn's Heirs* v. *Jackson*, 86.

COURTS OF THE UNITED STATES, 10; INJUNCTION, 1; JUDGMENT, &c. 2; MANDAMUS; NEW TRIAL, 2.

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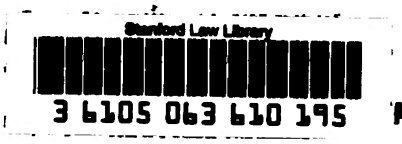

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